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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 180

MARIO MERCADO RIERA,

Petitioner,

v.

ADRIAN MERCADO RIERA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

JOSÉ A. POVENTUD,
Attorney for Respondents,
Adrián Mercado Riera and
Margarita Mercado Riera.

CELESTINO IRIARTE,
F. FERNÁNDEZ CUYAR,
Attorneys for Respondent,
María-Luisa Mercado Riera de Belaval.

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Introductory

The above entitled cause really concerns questions of purely local law of Spanish origin, rightly decided, without dissent, by the supreme court of Puerto Rico. *Instead of dismissing the appeal, as misleadingly repeated in the Petition* (pp. 1, 8, 9, 26), *the Circuit Court of Appeals* for the First Circuit, in the interest of justice, *most properly and correctly affirmed the judgment of the local supreme court,*

under its Rule 39(b).[1] The court of appeals did not find any erroneous ruling by the Puerto Rico Supreme Court. On the contrary, it found that appellants "now apparently *for the first time,* assert the existence of a wide variety of questions of federal law. We have carefully considered their assertions and find them wholly unwarranted • • • Not only can we discern no 'clear or manifest error, or anything inescapably wrong' • • • in the decision of either of these questions of purely local-concern, or of any of the multitude of other similar questions presented, *but we cannot even discern any error at all in their decision.* Indeed, an inspection of the record and a study of the painstaking opinion of the Supreme Court of Puerto Rico, in which all questions presented were carefully, even elaborately, discussed, leaves us with the firm conviction that a hearing on these appeals could not possibly disclose the existence of any error of sufficient magnitude to warrant reversal • • •" 167 F. 2d 207, 208, emphasis supplied.

Opinions Below

The opinion of the supreme court of Puerto Rico is reported in *Mercado* v. *Mercado* (May 8, 1946), 66 D. P. R. 38-103, Spanish edition. A rehearing was denied and the judgment was thereupon reinstated (Partial Pr. R. 210, *Mercado* v. *Mercado,* 14 January 1947, 66 D. P. R. 801, 824, Spanish edition). English translations of the opinions appear in the partially printed record (Partial Pr. R. 130-192;

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[1] The propriety of proceedings under *Rule 39(b)* was sustained in *Mario Mercado e Hijos* v. *Commins,* 88 L. ed. 1396, 1399, col. 2 mid., 322 U. S. 465, 466 and in *De Castro* v. *Board of Commissioners,* 88 L. ed. 1384, 322 U. S. 451, 458. The appropriate exercise of appellate jurisdiction *on the merits* by the court of appeals, in view of the rule laid down by the United States Supreme Court, is fully explained in *Buscaglia* v. *Ligget & Myers Tobacco* (C. C. A. 1st, 1945), 149 F. 2d 493, 496, *footnote 3.* See also *Sosa* v. *Sosa* (C. C. A. 1st, 1947), 164 F. 2d 94; Point I-D, subdiv. 1, *infra.*

196-209).[2] The affirmatory decision of the Court of Appeals for the First Circuit (Partial Pr. R. 367-370) is reported in *Mercado Riera* v. *Mercado Riera* (April 9, 1948), 167 F. 2d 207-208.

Jurisdiction

The circuit court of appeals entered its judgment on April 9, 1948, *affirming* that of the insular supreme court upon a most careful consideration, under its Rule 39(b),[3] of a lengthy statement on appeal or brief submitted by petitioner on January 19, 1948, a motion to dismiss or affirm filed by respondents on February 27, 1948, a memorandum in reply lodged by petitioner on March 22, 1948, and the complete typewritten transcript of record on the appeal taken by said petitioner (Partial Pr. R. 370). A petition for a writ of certiorari was filed here on July 27, 1948, within an extension granted therefor (Partial Pr. R. 372). The jurisdiction of this Hon. Court is asserted by petitioner under the *Judicial Code*, §240(a) as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. A. §347).

However, as hereinafter shown, the petition should be dismissed because there is no ground on which the reviewing power of the United States Supreme Court may be invoked. (See pp. 8-42.)

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[2] References are to a *partially printed* record and to the *complete, original or typewritten record* sent up by the Court of Appeals. The partially printed record will be designated as *"Partial Pr. R., p. ....."*. The *complete typewritten record*, as *"Typ. R., Oral Testimony, p. ...."*, or *"Typ. R., Documentary Evidence, p. ....."*. It will be noted that the "complete typewritten transcript" of the record (*Partial Pr. R.* 214) which, with the statement on appeal and briefs, was considered by the court of appeals in rendering its affirmatory judgment under its *Rule 39(b)* (*Partial Pr. R.* 367-370), has not been printed as required by *Rule 38*, paragraphs 1, 3 and 7, of the Rules of this Court (See Point I-E, *post*).

[3] See *Buscaglia* v. *Ligget & Myers Tobacco Co.*, 149 F. 2d 493, 496.

Statement of the Case

Petitioner's inaccurate, garbled statement and a proper understanding of the questions sought to be raised, require a brief reference to the essential facts and proceedings below.

Mario Mercado Montalvo died upon August 22, 1937, leaving a will (Partial Pr. R. 126-130), wherein he designated as his sole and universal heirs his four children, of full age, María-Luisa, Margarita, Adrián and Mario Mercado Riera. The latter, Mario, was appointed testamentary executor (Partial Pr. R. 17), *but his executorship was adjudged fully terminated as of September 1, 1939* (Partial Pr. R. 130 mid.).[4]

This case solely involves a controversy on final accounts first rendered by the ex-executor Mario, petitioner herein, to his three coheirs in March 1940 (Partial Pr. R. 18-25). The duty to submit accounts by extrajudicial executors to the heirs, upon the expiration of the executorship, mainly arises in Puerto Rico from the *Civil Code, ed. 1930, §829.* It is there provided that *"the executors shall submit an account"* of their incumbency to the heirs. Moreover, the parties here additionally stipulated for the rendition of final accounts by petitioner to his coheirs, on September 24, 1938 (Partial Pr. R. 111, Compromise Contract, clause 3, subdiv. g), which he did one year and six months later, or on March 6, 1940 (Partial Pr. R. 18), as also heretofore

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[4] Both local and national courts have held said petitioner's *extrajudicial executorship concluded by operation of law, ipso jure, on and since September 1, 1939. Mercado* v. *District Court* (July 14, 1943), 62 P. R. R. 350, syll. 2, affd. in *Mercado Riera* v. *Mercado Riera* (November 23, 1945), 152 F. 2d 86, cert. den. sub. nom *Riera* v. *De Belaval* (May 6, 1946), 90 L. ed. 1612, 328 U. S. 837, 66 S. Ct. 1010. See also *Mercado* v. *Mercado* (May 8, 1946), 66 D. P. R. 44, Spanish edition, Partial Pr. R. 130 mid., 145 bot.

judicially determined (*Mercado* v. *District Court,* 62 D. P. R. 359 top, affd 152, F. 2d 91, col. 1, top; *Mercado* v. *Mercado,* 66 D. P. R. at pp. 57 mid., 58, Spanish edition, Partial Pr. R. 130 bot., 143 bot., 145 mid.).

It was by this agreed medium—rendition of final accounts —that the ex-executor was to claim from his coheirs any proper, legal or *warranted charges against, or disbursement from, the hereditary funds.* So petitioner, though tardily, served his account to March 4, 1940 (Partial Pr. R. 18-25).

Respondents, through the stipulated procedure and believing there were numerous *omissions, charges or claims* by the ex-executor, petitioner herein, which were unwarranted or improper, due to his lack of power, as illegal, unnecessary or otherwise, duly filed in the Ponce district court, original (Partial Pr. R. 26-36) and supplementary (*ib.,* 53-55) *objections, challenging some of the items in the accounts rendered.* See also opinion of insular supreme court, Partial Pr. R. 131-136. A detailed answer or reply was then lodged by petitioner (Partial Pr. R. 36-53; 136-140).

This independent proceeding on the accounts was heard by the Ponce district court. The trial and presentation of evidence took 31 days, from October 14, 1940 to May 27, 1941 (Partial Pr. R. 57 top, 140 top). On February 19, 1942, the Ponce court, through Judge Sepúlveda, rendered its opinion (Partial Pr. R. 56-87) and final money-judgment (*ib.,* 88-92), whereby petitioner was ordered to pay or refund to the heirs the several amounts there set out (*ib.,* 88-92).

Mario Mercado Riera then appealed to the Supreme Court of Puerto Rico from the said district court's judgment on the accounts, and served notice of his appeal on his

three coheirs Adrián, María-Luisa *and Margarita Mercado Riera* (Partial Pr. R. 93 top).

On May 8, 1946, the local supreme court rendered a money-judgment modifying, and in some respects increasing, the Ponce district court decree dated February 19, 1942 (Partial Pr. R. 130-192; *Mercado* v. *Mercado,* 66 D. P. R. 38-103, Spanish edition). By that affirmance, the supreme court ordered Mario Mercado Riera, now petitioner, to pay or refund for his three coheirs the several sums therein specified (Partial Pr. R. 193-195).

Thereupon Mario, petitioner herein, as alleged "executor", attempted a new appeal to the circuit court of appeals for the first circuit, from the aforesaid judgment of the Island's supreme court dated May 8, 1946 (Partial Pr. R. 125), as reinstated on January 14, 1947 (*ib.*, 210).

Petitioner then lodged in the circuit court of appeals a 62-page statement on appeal or brief (Partial Pr. R. 214-278), with a typewritten record of over 2,500 pages. Under *Rule 39(b)* of the Court below, respondents moved to dismiss *or for a summary affirmance* of the insular supreme court's judgment (Partial Pr. R. 279-338), on the ground that it was manifest from the record submitted and the statement on appeal that the judgment appealed from by petitioner was obviously right and in nowise inescapably wrong or patently erroneous.

The court of appeals, upon a well considered examination and appraisal of the whole record and briefs presented by the parties, under its *Rule 39(b),* affirmed the judgment of the supreme court of Puerto Rico on April 9, 1948 (167 F. 2d 207, Partial Pr. R. 367-370). It held that after having carefully considered the federal questions asserted *for the first time on appeal,* they were found wholly unwarranted; and, as to the multitude of *local questions presented,* that an inspection of the record and a study of the

painstaking opinion of the Supreme Court of Puerto Rico, left the court of appeals with the firm conviction that a hearing on the cross-appeals therein taken *"could not possibly disclose the existence of any error * * * to warrant reversal. Under these circumstances it seems to us* [the court of appeals] *that the law permits summary affirmance under our Rule 39(b) since a hearing on the appeals would clearly be futile* (*Mario Mercado e Hijos* v. *Commins,* 322 U. S. 465, 566, 64 S. Ct. 1118, 88 L. ed. 1396) *and that justice requires summary affirmance in order to prevent further useless expense and delay in this already overly long and undoubtedly very expensive litigation."* 167 F. 2d 208, col. 2, Partial Pr. R. 369-370.

Questions Suggested by Petitioner

Petitioner attempts to urge two supposed types of questions: federal and local (Petition 3-7, 7-11). But *Points I and II* below, with their respective subdivisions, will clearly exhibit the unsubstantial nature and even the absence of the so-called federal questions, as well as the correctness and justice of the Puerto Rico supreme court's judgment, affirmed by the court of appeals, on the suggested points of insular or local law.

ARGUMENT

I.

Jurisdictional Objections: Dismissal of Petition for Certiorari

A. Petitioner lacks the necessary reviewable interest, as alleged "executor" of any "estate."

1. At the time of his purported appeal to the court of appeals and of his petition herein, petitioner's executorship had expired.

Upon March 6, 1947, petitioner attempted to appeal as alleged *"executor"* from the judgment of the insular supreme court to the court of appeals below (Partial Pr. R. 1-5). *No appeal was taken by him individually.* Petitioner even prays issuance by this Court of a writ of certiorari *"as executor of the estate of Mario Mercado, Sr."* (Pet., p. 1).

If petitioner was no executor in 1947, when his appeal to the court of appeals was attempted as above shown, nor at the time of his petition herein, he obviously has no right or interest, as such executor, which could then or may now be reviewed by this Hon. Court. Petitioner would have to show that he was on March 6, 1947 and still is, Mercado's executor. *But any such effort would amount to a defiance of repeated judicial decisions that petitioner's executorship expired on September 1, 1939. Mercado* v. *District Court* (July 14, 1943), 62 P. R. R. 350, syll. 2, affd. in *Mercado Riera* v. *Mercado Riera* (November 23, 1945), 152 F. 2d 86, cert. den. sub. nom. *Riera* v. *De Belaval* (May 6, 1946), 90 L. ed. 1612, 328 U. S. 837, 66 S. Ct. 1010. See also *Mercado* v. *Mercado* (May 8, 1946, Partial Pr. R. 130 mid.),

66 D. P. R. 44, Spanish edition. In rendering judgment in this case (8 May 1946), the Puerto Rico supreme court expressly reiterated (Partial Pr. R. 130 mid.):

> "On July 14, 1943, we rendered judgment in certiorari case No. 1517, setting aside the order sought to be reversed, *holding that the term of the executorship pertaining to the estate of Mario Mercado Montalvo, who died testate on August 22, 1937, expired, by operation of law, on September 1, 1939* * * *"

After that final and last decision (May 8, 1946, 66 D. P. R. 44, Sp. ed.), it is inconceivable that petitioner should still insist on claiming any reviewable interest herein, as alleged *"executor"*. He is subject to the federal appellate rule that, upon expiration or removal from office of personal representatives, the latter have no interest, as such, which will support appellate review.[5]

2. *Absence of any "estate" here that may be "aggrieved" by the Puerto Rico judgment.*

a. *If any such "estate" could be said to exist, it would be benefited, not aggrieved.*

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[5] *Slater* v. *Thompson, et al.* (C. C. A. 8th), 255 Fed. Rep. 768, syll. 2 (public administrator, after removal from office, has no interest in the estate which will support an appeal); *Taylor* v. *Savage*, 11 L. ed. 132; *Kimball* v. *Kimball*, 43 L. ed. 932 (where letters of administration revoked, writ of error will be dismissed, as court cannot decide moot questions; and neither laches nor consent of parties can authorize court to exercise jurisdiction); *Ex parte Zalduondo*, 47 P. R. R. at p. 249 ("Appellees also draw our attention to the fact that at the time of the appeal the commissioner had finished his duties and was *functus officio*. The appeal must be dismissed * * *"); 3 C. J., Sec. 490, p. 629; 4 C. J. S. § 182, p. 353 ("After termination of his official or representative capacity, one may not appeal * * *"; 4 C. J. S. pp. 372, 373; 3 C. J. 646, col. 2 mid. ("* * * after his letters have been revoked or he has been removed, he [executor or administrator] cannot maintain an appeal or writ of error on behalf of the estate").

Even if petitioner still were Mercado's executor, which is not the case as just shown, he could urge no reviewable interest, in a representative capacity, except in behalf of a decedent's estate *which is aggrieved by the decree rendered by the Puerto Rico supreme court,* as affirmed by the court of appeals. In order that a representative may appeal in his representative capacity, while it lasts, the estate allegedly represented must be aggrieved by the decree appealed from, otherwise any appeal must be taken in his individual capacity. *Succession of Hartigan,* 51 La. Ann. 126, 24 So. 794; *Moore* v. *Ferguson,* 72 N. E. 126 (Ind.); *Ansel* v. *Kyger,* 110 N. E. 559, 560 col. 2, mid. (Ind. A). See also cases in footnote 5, *supra.*

If such "estate" could be said to exist here, *it would certainly be benefited, "not aggrieved",* by the judgment below, in view that, respecting petitioner, as ex-executor, it only imposes personal or individual liability on him, by ordering said petitioner to increase or add to the hereditary assets, or to restore to the heirs, divers amounts improperly disbursed or charged by him (Partial Pr. R. 193-195, Puerto Rican judgment; *ib.,* 1-5, petitioner's notice of appeal from local supreme court's judgment).

b. *Parties hereto are not concerned with any "estate" in the sense intimated by petitioner.*

The Anglo-Saxon legal term *"estate"* includes the Spanish concept of *"testamentaría",* which is the equivalent of a *"judicial administration of an estate"* or of hereditary assets in custodia legis, i. e., under direct control and custody of an officer appointed by a court of justice. *The parties here are not and were never concerned with any such "estate" (testamentaría), since there has never been any judicial administration of the Mercado inheritance, as has been repeatedly adjudicated. Mercado* v. *District Court* (July 14, 1943), 62 P. R. R. 350, syll. 5, pp. 369-371,

affd. in *Mercado Riera* v. *Mercado Riera* (Nov. 23, 1945), 152 F. 2d 86, 96, cert. den. 90 L. ed. 1612, 328 U. S. 837.[6]

In *Mercado* v. *District Court, supra,* decided June 14, 1943, 62 P. R. R. 350, syll. 3, and at p. 367, it was further decreed that the extrajudicial Civil Code ex-executor, petitioner here, should restore the properties *"to all the heirs"*, and that since said executorship terminated *ipso jure* from September 1, 1939, *the execution of the will of the testator devolved upon the heirs,* according to the *Puerto Rican Civil Code, ed. 1930,* §§ 832 and 833 (see also Partial Pr. R. 130, mid., *Mercado* v. *Mercado,* 66 D. P. R. at p. 44, Spanish edition).

Therefore, any claim concerning the assets left by the common ancestor of the parties hereto, is and must be, on and after the expiration of petitioner's executorship on September 1, 1939,[7] *the personal and individual concern of the heirs or co-owners under local law, Civil Code* § 833, as construed by the insular supreme court. The well-established, binding authority of prior judicial decisions between the same parties, cannot be easily disturbed. They suffi-

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[6] In Puerto Rico, the appointment of an executor does not mean that the assets of the estate come under judicial administration. The executor spoken of in our Civil Law is not in the same position generally prevailing in the American legal system. *Aponte & Sobrino* v. *Heirs of Pérez,* 48 P. R. R. 437, 441-442. Administrators and executors in the United States fully represent the deceased; but in Puerto Rico, the principle of universal succession in a modified form applies and the heirs represent the decedent from the moment of the death and are entitled to all the property. *Pérez* v. *Succrs. of M. Pérez & Co.,* 41 P. R. R. 844, 845. The above cases were followed and applied in *Mercado* v. *District Court,* 62 P. R. R. at pp. 370-371, affd. 152 F. 2d at p. 87, col. 2 bot., cert. den. 90 L. ed. 1612, 328 U. S. 837.

[7] When the root is cut the branches fall. *Smallwood* v. *Gallardo* (Holmes, J.), 72 L. ed. 153, 156, col. 2 bot., 275 U. S. 56, 62.

ciently offset petitioner's untenable intimation that his alleged reviewable interest concerns an *"estate"*.[8]

In view that it has been judicially determined between the same parties that there never was any judicial administration of testator's assets, *there cannot possibly exist now any "estate" here, but only the personal liability of the ex-executor, petitioner here, for the economic values represented by the judgment below in favor of respondents.*[9]

Moreover, brief for respondents in opposition (pp. 115 mid., 112) to a prior certiorari petition (No. 908), October Term 1945, *between the same parties,* whose record is on

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[8] Any reference to petitioner as *"executor"* or to an *"estate"*, *instead of to hereditary rights, properties and liabilities which devolved upon the heirs, individually, since September 1, 1939,* are obvious misdescriptions or loose expressions, in view of controlling and binding decretal portions in judgments rendered by the courts, where the question as to cessation of the executorship on September 1, 1939, was finally determined. *Mercado* v. *District Court,* 62 P. R. R. 350; *Mercado Riera* v. *Mercado Riera,* 152 F. 2d 86, 96. col. 2 top, cert. den. *Riera* v. *De Belaval,* 90 L. ed. 1612, 328 U. S. 837. The court of appeals itself refers to petitioner as *"the ex-executor"* (167 F. 2d at p. 208, par. 2). As once stated by the Puerto Rico supreme court, judicial decisions deserve respect and observance by, at least, parties and privies. *Luce & Co.* v. *Cintrón,* 38 P. R. R. at p. 481 mid. And that should be the case *"if appellate decisions are to serve any purpose."* *Porto Rico Coal Co.* v. *Domenech* (C. C. A. 1st), 41 F. 2d at p. 185, col. 2 bot.

[9] The activities of an extrajudicial Civil Code executor (as petitioner here was) or of any "judicial administrator" may be put at an end by operation of law or by an order of court, *though the personal responsibility of the ex-incumbent for acts or omissions during the incumbency continues until finally discharged in the accounting proceeding* (*See Boerman* v. *Heirs of Boerman,* 52 P. R. R. at p. 597 top; insular supreme court's opinion, Partial Pr. R. 157 mid., citing *Sanchez Román, Derecho Civil,* vol. 11, p. 1454).

file in this Hon. Court,[10] and which was denied here (*Riera* v. *De Belaval*, May 6, 1946, 90 L. ed. 1612, 328 U. S. 837), also shows that the ex-executor, again petitioner here, without allowing the 60-days fixed by the Puerto Rico supreme court to elapse,[11] *admitted having completely disconnected himself from the hereditary assets "in every sense, except as co-owner thereof"*; that "all business concerning same must be transacted through the heirs and not through its executorship"; and that Mario Mercado Riera, now petitioner, bought from his three coheirs the latter's three-fourth interest in several urban properties which were part of decedent's assets, by public deed No. 44, dated November 18, 1943, executed at Ponce before Notary Public, C. J. Santiago Matos, whereby petitioner Mario paid vendors the sum of $70,350, which they applied with other funds to the extinction of their three-fourths share in some existing liabilities.

c. *Even the distribution or adjudication of the hereditary assets was contractually consummated by the coheirs, as has been judicially acknowledged.*

The distribution or adjudication of the hereditary assets *was contractually consummated* by the coheirs—being of

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[10] Federal appellate courts may examine their own records and take judicial notice thereof in regard to proceedings formerly had thereon by one of the parties to the litigation now before it. *Diminic* v. *Tompkins*, 48 L. ed. at p. 1114, col. 1 top; *De Bearn* v. *Safe Deposit & T. Co.*, 58 L. ed. at p. 836, col. 1 bot.; *National Fire Ins. Co.* v. *Thompson*, 72 L. ed. 881, syll. 1.

[11] In *Mercado* v. *District Court*, 62 P. R. R. 350, 373 mid., upon concluding, as aforesaid, that the executorship expired on September 1, 1939, and that the coheirs had already accepted the inheritance and agreed upon its adjudication as per their compromise agreement of September 9, 1938, *the insular supreme court ordered the ex-executor, within 60 days, to deliver the assets to the heirs*, so they might proceed to the further execution of testator's will under *Civil Code*, § 833 (62 P. R. R. at p. 373 mid.; see also Partial Pr. R. 130 mid.).

full legal age—thru their compromise agreement of September 9, 1938, clause 3rd, subdivisions (f) and (l). See Partial Pr. R. 110 bot., 113 top. To that contract by and between the heirs, *the then (1938) executor and commissioner expressly assented in so far as such distribution of the inheritance might in any way affect them* (Partial Pr. R. 112-113).

In the *Mercado* v. *District Court* case decided July 14, 1943 (62 P. R. R. 350 and at pp. 356 mid., 369 top, 372 top, affd. in *Mercado Riera* v. *Mercado Riera,* 152 F. 2d 86, 90, cert. den. 90, L. ed. 1612), the Island supreme court held, among other things, that when the executorship terminated on September 1, 1939, the execution of the will of testator devolved upon the heirs, *and also that the heirs had accepted the inheritance and agreed upon its distribution.* And from the judgment and decision of the Puerto Rico Supreme Court (May 8, 1946, Partial Pr. R. 192), affirmed by the Court of Appeals (167 F. 2d 207; Partial Pr. R. 367-370), it additionally appears that *the distribution and adjudication of testator's properties, and of such other assets "as may be discovered later" was agreed upon by the coheirs in clause 3, par. (f) of their compromise agreement* (Partial Pr. R. 110 bot.). In this connection, the insular supreme court reiterated in its opinion below:

> "The partition and allotment of the real property was agreed to by the heirs in paragraph (f), Third Clause of the compromise contract, thus:
>
> 'The remaining properties of the estate of Don Mario Mercado Montalvo, as shown by the aforesaid inventory, *together with any others which may turn up afterwards as belonging to the decedent,* shall be deemed, and *are hereby apportioned,* in equal shares, to the four heirs * * * who will at all times endeavor to avoid the continuation of the common ownership'. (Italics ours.)

"The previous apportionment of the properties, made by the heirs themselves in virtue of the compromise contract, was acknowledged by this court in Mercado v. *District Court,* 62 P. R. R. 350, 369. *Hence, it was not necessary to make any pronouncement, such as the one contained in the order appealed from, regarding the allotment of the properties, which the heirs had already apportioned among themselves, share and share alike."*

(Partial Pr. R. 192, *Mercado* v. *Mercado,* May 8, 1946, 66 D. P. R. at p. 102 mid., Spanish edition).[12]

In short, it is unquestionable that petitioner lacks the necessary reviewable interest in his asserted representative capacity *as alleged executor,* in view that his executorship expired since September 1, 1939, that there was *no "estate" here which might be "aggrieved",* but rather benefited by the Puerto Rico judgment, that the parties hereto are not concerned with any "estate" in the sense intimated by petitioner, and, lastly, because even the distribution or adjudication of the hereditary assets was contractually consummated by the coheirs thru their compromise agreement of September 9, 1938.

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[12] Associate Justice de Jesús, of the Puerto Rico Supreme Court, in his opinion on rehearing in this case, refers to the compromise agreement, as a *"partition contract"* (Partial Pr. R. 209 top) or as a *"contract of partition"* (*ib.*, p. 209, footnote 5).

And as repeatedly held in Puerto Rico, a voluntary distribution of the estate among heirs of legal age *renders entirely superfluous any further action by the ex-executor* (petitioner herein) *or the ex-partitioner* (Porrata, one of his attorneys), especially if they consented to the partition agreement and, a fortiori, if they subsequently permitted their incumbency to expire. See *Puerto Rico Code of Civil Procedure,* ed. 1933, § 604; *Ex. p. Sotomayor,* 24 P. R. R. 172; *Irizarry* v. *Registrar,* 22 P. R. R. 88; *Galindo y Escosura, Legislación Hipotecaria,* Vol. II, pp. 257, 258; *Mercado* v. *Mercado,* May 8, 1946, 66 D. P. R. at p. 102 mid. (Partial Pr. R. 192, insular supreme court's opinion).

B. There is no federal question involved here, much less of a substantial character.

1. *The determination by the Puerto Rico supreme court as to the reasonableness of certain allowances for traveling expenses and attorney's fees in connection with alleged services in the United States Tax Bureau, does not raise any federal question at all* (See Petition, Points I and II, pp. 3-4, 26-34).

Petitioner expends much argument respecting the nature of an alleged federal tax controversy which he and his attorney invited from the federal tax authorities, notwithstanding the inapplicability of the federal estate tax to Puerto Rican estates under the explicit mandate of *Section 9, Organic Act of 1917* (48 U. S. C. A. § 734, p. 230, 39 Stat. 954), providing that the statutory laws of the United States not locally inapplicable, shall extend to Puerto Rico, *"except the internal-revenue laws."* This statutory *exception* continued upon amendment of *Section 9, supra, on April 30, 1946* (60 Stat. 158, 48 U. S. C. A., Pocket Part 1947, p. 117 bot., § 734 as amended). The Federal Estate Tax Bureau, therefore, could reach no other conclusion than that the Mercado "estate is not subject to the provisions of the Federal estate tax law generally applicable to such citizens *in view of the specific provisions of the Organic Law of Puerto Rico"* (Petition, pp. 91-92).[13]

Yet, the only matter relating to the Federal Estate Tax Bureau was the $18,000 which petitioner, as accounting ex-executor of testator Mario Mercado Montalvo, the common ancestor of all the parties herein, paid to Pedro M. Porrata out of inheritance funds, charging same to his coheirs, as alleged attorney's fees in connection with a so-called

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[13] In *Piacentini* v. *Buscaglia*, 59 D. P. R. 782 mid., Spanish text, it is also said by the insular supreme court that the federal estate tax is inapplicable to Puerto Rico. However, this part of the opinion has been inadvertently omitted from the English text in 59 P. R. R. 777 mid.

federal inheritance tax matter (Partial Pr. R. 20 mid., 68 bot-69, 160 bot-161). The Ponce trial court partly allowed such fees after cutting them down to $4,000 (Partial Pr. R. 68 bot-69). It then ordered petitioner Mario to refund the overpayment amounting to $14,000 (*ib.*, p. 69 mid.). The allowance for fees was raised from $4,000 to $7,500 by the judgment of the Puerto Rico supreme court, but petitioner Mario was then required to restore or return to the heirs $10,500 instead of $14,000 (Partial Pr. R. 161 mid.).

There was also a claim for traveling and other expenses of the ex-executor (petitioner here) and Porrata for the same matter amounting to $13,450 (Partial Pr. R. 67 bot.).

Both of the above *claims were decided by the courts below on the evidence introduced* by the parties.

The Ponce trial court held (Partial Pr. R. 67 bot-69, 89 bot.):

> "*Impeachment No. 9.* This impeachment is to an item entitled 'Traveling Expenses and other expenses in the U. S. incurred by the executor and Pedro M. Porrata, amounting to $13,450, and the item of $18,000 in favor of the latter, for attorneys fees.'
>
> "*Decision:* The court, *after consideration of the evidence introduced by all the parties* in connection with the 9th impeachment, is of the opinion, and decides, that the journey to and stay in the United States of the executor in the company of attorney Pedro M. Porrata, in connection with the Federal estate tax controversy, were beneficial to the estate.
>
> "According to the testimony of the witness for the executor, Pedro Juan Rosaly and Ramiro Lazaro, the court is of the opinion that ten dollars ($10) daily is a just and reasonable per diem for expense of the executor Mario Mercado Riera, and an equal amount, for the same purpose, is a just and reasonable per diem for

Attorney Pedro M. Porrata, during his stay in the United States, from September 10, 1938 to March 15, 1939 (a period of 157 days). 157 days at $10 daily for the executor and another $10 daily for the attorney, make a total of $3,140. And granting them, furthermore, for their joint travel expenses, the sum of $810 equals a total amount of three thousand nine hundred fifty dollars ($3,950).

"The impeachment of said item of expenses is hereby sustained in part, said item being approved and confirmed to the extent of three thousand nine hundred fifty dollars (3,950) it being ordered that the difference between said amount and the original item, to wit: $8,050 be transferred to the assets of the final account.

"With respect to the item of $18,000 for fees claimed by Pedro M. Porrata, the court *upon consideration of all the evidence in this subject introduced by both parties, especially the testimony of attorney Pedro M. Porrata himself, from which it appears: that 'no fee contract was made, the criterion for his fees was that he should be paid according to the amount of the problems arising and the results obtained'; and that Mario Mercado Montalvo (the testator of the estate) paid the University expenses of attorney Porrata in the United States; that said attorney has been allowed $20,000 fees and expenses in the contract of compromise of September 9, 1938, for making the partition of the estate; that the attorney receives a retainer from the partnership 'Mario Mercado e Hijos' amounting to $150 monthly, and another from the Municipality of Guayanilla of $25 monthly, and that both retainers were received by him during his absence in the United States, and that the partnership 'Mario Mercado e Hijos' (the partners of which are the coheirs themselves) gives him free office space, the court calculates that four thousand dollars ($4,000) is a just*

and reasonable attorneys fee for attorney Pedro M. Porrata for his professional services rendered in connection with the Federal estate tax, and it so holds.

"The impeachment of said item for attorneys fees is therefore sustained in part, a fee of four thousand dollars ($4,000) being approved by the court it being ordered, therefore, that the difference of $14,000 be transferred to the assets in the final accounts.

"With respect to the item for $1,450 for extra expenses of attorney Pedro M. Porrata during his stay in the United States, the court is of the opinion that it should and hereby does sustain said impeachment; the entire amount of $1,450 should therefore be transferred to the assets in the final account, and it is so ordered."

On appeal, the insular Supreme Court determined:

"14. The executor and his attorney stayed in the United States, engaged in activities which the lower court deemed beneficial to the estate, from September 10, 1938, to March 15, 1939, or during a period of 157 days. In the final account of the executor the following items are charged to the inheritance in connection with that trip:

"(a) Traveling and extra expenses $13,450.00

"(b) Attorney's fees 18,000.00

"*Relying on the evidence introduced* by the contestants, the lower court reduced the first item to $3,950, assigning to the executor and his attorney a per diem allowance of $10 each • • • and adding to the total allowance of $3,140 the transportation expenses amounting to $810 for both travelers. *We fail to find any reason for disturbing the weighing of the evidence thus made by the lower court.* The item of $3,950 granted by the lower court is hereby approved. The

executor must reimburse the estate for the excess amount charged, that is $9,500, the restoration of which was ordered by the lower court.

"The second item was reduced to $4,000. *We agree with the lower court that the $18,000 charged to the heirs as attorney's fees, for work connected with the federal inheritance tax, is excessive.* Nevertheless, we think that the reduction made by the lower court, from $18,000 to $4,000, is also excessive. In view of the fact that Attorney Porrata remained in the United States, absent from his law office, during five months, which he devoted to the defense of the interests of the heirs, and that his services were beneficial to the estate, *we are of the opinion that the sum of $7,500 is a fair and reasonable compensation for the professional services thus rendered.* The item for attorney's fees will be increased to $7,500, and the executor must restore to the estate the difference, that is, the sum of $10,500 instead of that of $14,000 which he was directed to restore by the order appealed from" (Partial Pr., R. 160 bot.-161).

It leaps to the eye that, in passing on petitioner's claim in the accounts he rendered as ex-executor, regarding fees for attorney Porrata and respecting expenses in connection with alleged services before the Federal Estate Tax Bureau, the Puerto Rico supreme court, as concerns petitioner, did not and could not at all consider any federal question; *its judgment merely held, on the evidence, that $7,500 was a reasonable sum to be allowed, as a question of local law,* and petitioner was ordered to return to the heirs $10,500, excessively paid to his attorney Porrata; and the insular courts also allowed $3,950 for traveling expenses, but required petitioner to refund $9,500 improperly charged by him, as ex-executor, to his coheirs (Partial Pr. R. 161).

The record thus fails to reflect any definite or real federal question concerning petitioner, in regard to the federal estate tax law, its amendments or otherwise, as suggested by said petitioner.

The fact *that services might have been renderd before the Federal Estate Tax Bureau does not create any federal question, much less of a substantial character.* It follows that there is a total absence of any federal controversy in this proceeding. A large body of applicable decisions hold that even appeals should be dismissed for lack of appellate jurisdiction or as not raising a substantial federal question. *Stewart* v. *Kansas,* 60 L. ed. 120, syll. 2, 239 U. S. 14; *Zucht* v. *King,* 67 L. ed. 194, syll. 2, 260 U. S. 174, 176; *Kammerer* v. *Kroeger,* 81 L. ed. 254, 255, 299 U. S. 303-304; *South Bell Tel. Co.* v. *Oklahoma,* 82 L. ed. 752, syll. 2, 755, 303 U. S. 207, 212-213; *Patterson* v. *Stanolind Oil & Gas Co.,* 83 L. ed. 231, syll. 4, 233, 305 U. S. 376; *McArthur* v. *United States,* 86 L. ed. 1192, 315 U. S. 787; *Succession of Tristani* v. *Colón* (C. C. A., 1st), 71 F. 2d 374, syll. 1 and 2; *Rules 38, subdiv. 2 and 12, subdiv. 1, par. 3, of this Hon. Court; Rules C. C. A. 1st, No. 39(a).*

a. *Respondents' cross-appeal from the insular supreme court's judgment, also summarily affirmed by the court of appeals under its Rule 39(b), stood on a different footing.*

Concerning the reasonableness of Porrata's alleged fees and expenses, petitioner groundlessly states that this question was "admitted as federal by appellees [respondents here] themselves in their cross-appeal to the Circuit Court" (Petition, p. 34 mid.).

The situation regarding allowance by the courts below of $7,500 to petitioner on his account, as fees for Porrata's (one of his attorneys) claimed services before the Federal Estate Tax Bureau, stood on an entirely different footing. As demonstrated by respondents, as appellants in No. 4264 before the court of appeals, they consistently urged all

through this litigation that the ex-executor, petitioner herein, *was not legally entitled to any allowance for fees at all,* because it would contravene applicable, prohibitory, regulations of the United States Treasury Department, issued under the authority of certain Federal Estate Tax statutes. *Ludwig* v. *Raydure,* 25 Ohio App. 293, 157 N. E. 816, cert. den. 72 L. ed. 418, 275 U. S. 545; *Massilon Savings & Loan Co.* v. *Imperial Finance Co.* (1926), 114 Ohio St. 523, 151 N. E. 645; *Williston on Contracts,* § 1759.

As required by Acts of Congress and Treasury Regulations[14], *Porrata was not enrolled as an attorney in the Treasury Department* at the time of rendering or of agreeing to render his stated professional services to the ex-executor in the Federal Estate Tax Bureau. According to a certificate issued by the Committee on Enrollment and Disbarment, Treasury Department, *"Mr. Pedro M. Porrata does not appear on the records of the Committee on Enrollment and Disbarment as a person authorized to represent claimants before the United States Treasury Department or any of its bureaus or divisions" (Typ. R., Documentary Evidence,* p. 460, Exh. Q). Porrata himself so admitted in his oral testimony before the court of first instance at Ponce. He did not obtain or possess the Enrollment Card (*Typ. R., Oral testimony,* 924 bot., 926 bot.). He never filed any power of attorney (*ib.,* 909 bot., 910 bot., 912 mid.), nor the statement relative to fees to be filed with power of attorney (*ib.,* 923 mid., 924 top).

Under such circumstances, *applicable Federal Acts and Treasury Regulations* (footnote 14) precluded approval or allowance of any fees for services in any division or *bureau of the United States Treasury Department.* In consequence, Porrata was not even entitled to recover

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[14] *Treasury Regulations,* § 74; *Circular Letter No. 230,* Revised, U. S. Treasury Department, §§ 2a, 2(y), par. 3, 6(a), 8; *Conference and Practice Requirements,* Revised May, 1936, pars. I-II; Act of July 7, 1884, 5 U. S. C. A. § 261, 23 Stat. 258; 26 U. S. C. A. §§ 3900, 3901 (2).

therefor from the ex-executor, petitioner here, who plainly could not, in turn, charge or claim anything on that score from his coheirs in his final account in suit (Partial Pr., R. 20 mid.).

Hence, the federal question urged by respondents before the court below in their cross-appeal stood on a different footing and was substantial. However, respondents, after a re-appraisal of the whole situation, decided to abide by the court of appeals' summary affirmance as to their cross-appeal and to forego an attempt to unnecessarily burden the attention and docket of this Hon. Court.

2. *Questions as to alleged lack of due process on this record are fantastic.*

a. *The insular supreme court's judgment does not affect the partnership Mario Mercado e Hijos. Moreover, it was entered without prejudice to such partnership* (see Petition, Point III, pp. 5-6, 34-46).

Petitioner preposterously asserts that the partnership Mario Mercado e Hijos is an indispensable party to this proceeding impeaching the accounts rendered by him, as ex-executor, to his coheirs (Petition, Point III, pp. 5-6, 34-46).

The accounts were rendered by virtue of the compromise agreement of September 9, 1938, clause 3rd, paragraph (g), providing, in substance, for the rendition *of a final account by petitioner to his coheirs, and that any objections thereto by the latter* "shall be submitted to the corresponding court • • •" (Partial Pr., R. 111 mid., 114 top). It is plain, therefore, that all parties to the said compromise agreement provided a separate, plenary proceeding for an accounting between the ex-executor, now petitioner, and his coheirs (Partial Pr., R. 150 top). *It concerns no one else.* So, the Puerto Rico judgment, as to the items wherein the said partnership is named as possible debtor or otherwise, in no way affects or binds the said firm.

(1) Thus, respecting a certain chose in action for $45,359.50, which decedent Mercado Montalvo had loaned to the firm of Mario Mercado e Hijos, the Puerto Rico Supreme Court held that in the inventory attached to the compromise contract, *petitioner "failed to include the alleged credit for $45,359.50 in favor of the decedent and against Mario Mercado e Hijos; but it was expressly stipulated that all credits, rights, and claims belonging to the decedent which might turn up or be discovered in the future, would be considered as inventoried"* (Partial Pr., R. 191 mid.; see also compromise contract, *ibid.* 110 bot.; inventory, *ibid.* 122 bot.).[15]

The Puerto Rico supreme court further stated:

> "Mario Mercado Riera, besides being the executor and managing director of Mario Mercado e Hijos, was the person who signed and verified the complaint regarding the deposit of the $45,359.50; but neither in the books of the partnership nor in those of the executorship was any entry made respecting said deposit [Partial Pr., R. 186 top].
>
> "The opposing heirs prayed that the executor be ordered to include in his final account the amount of said credit, plus interest thereon * * * [Partial Pr., R. 186 top].
>
> * * * * * * * *

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[15] It follows that, contrary to petitioner's unwarranted assertion (Petition, pp. 35, 39 mid., 45 bot.), far from changing, invalidating or avoiding any contract, the local courts fully respected and applied the above named compromise agreement of September 9, 1938 (Partial Pr. R. 110 bot.; 122 bot.). The compromise agreement and the inventory, as determined by the courts below, both provided—and it was expressly therein stipulated by the parties thereto—that all other properties, credits or rights of testator, which may appear or be discovered in the future, are to be regarded as inventoried. Therefore, when omitted assets as the credit for $45,359.50 are ordered added or included, no change or amendment of any contract or inventory occurs, but only a clear compliance with the parties' intent and explicit agreement.

"The facts stated above are supported by the evidence introduced by the opposing heirs [respondents herein], *which was strengthened rather than controverted by the one adduced by the executor* [petitioner here]. *The purpose sought by the contestants in introducing their evidence was not to demand a decision adjudging Mario Mercado e Hijos to pay to the heirs of Mercado the sum loaned by Don Mario to the partnership to be deposited by the latter.* The lower court had no jurisdiction to make such an adjudication, inasmuch as Mario Mercado e Hijos was not a party to the proceeding nor had submitted itself in any way to the jurisdiction of the court.

"Nevertheless, the opposing heirs were entitled to introduce evidence tending to show that certain funds which personally belonged to the decedent had been loaned by the latter to the partnership Mario Mercado e Hijos in order to enable the latter to make the deposit in court. Since the evidence adduced was sufficient to establish *prima facie* the obligation on the part of Mario Mercado e Hijos to repay, to Don Mario Mercado or his heirs, the sum loaned, *the lower court had jurisdiction to order the executor to include the alleged claim among the assets of the estate. The mere inclusion of the claim in the inventory of the estate does not injure any right belonging to the supposed debtor, the partnership Mario Mercado e Hijos, inasmuch as the latter will have an opportunity to be heard and to defend itself if and when the allottee or allottees of said claim seek to enforce it by judicial action.* The only effect of the inclusion sought is to lay a foundation for the allottee of the claim to demand its payment.

"We have carefully examined the whole evidence. We regard it as ample and sufficient to establish prima facie the right of the opposing heirs to have included in the inventory, as chose in action belonging to the

estate, their right to claim the repayment of the alleged loan.

"The ruling complained of will be reversed and substituted by another directing the inclusion of the alleged claim in the inventory and in the final account of the executor" [Partial Pr., R. 186 bot.-187].

(2) Respecting another chose in action for $2,625 (half of $5,250), *which belonged to decedent and appears entered as "Fondo Panteón Familia" in the books of the firm Mario Mercado e Hijos, the insular supreme court merely ordered accounting-petitioner "to include in the inventory and in his final account a credit for $2,625,* that is, the one-half share belonging to the decedent out of the item *'Fondo Panteón Familia"*, which shows a total of $5,250, according to the account books of Mario Mercado e Hijos" (Partial Pr., R. 195 mid., 187 bot.-190).

(3) *Concerning the $16,392.25 interest improperly disbursed by accounting-petitioner, out of hereditary funds, on a debt due by the firm of Mario Mercado e Hijos, and not due by the testator or his heirs, it is petitioner*—not the firm, which had nothing to do with the accounting proceeding and was not even a party to it,—*who must repay or refund to respondents, according to the judgment of the supreme court of Puerto Rico, affirmed by the court of appeals* (Partial Pr., R. 151 bot.-154; *ib.*, 367-370). Regarding this item, the insular supreme court stated: "The contention of the appellant executor [petitioner here] is untenable, *as it is against the weight of the evidence and is based on a premise which is contrary to the real facts"* (Partial Pr., R. 152 bot.).

(4) *And with reference to the item of $20,019.15 which petitioner, as accounting ex-executor, unnecessarily and illegally paid as local inheritance tax on $320,306.53, despite the fact that the latter sum belonged to the firm Mario Mercado e Hijos, and was not part of the hereditary funds, it is not said firm nor the insular treasurer, but accounting petitioner who must refund to respondents, as rightly*

decided by both the district and the supreme courts of Puerto Rico (Partial Pr., R. 79, 90 bot., 142 mid.). The Ponce district court, affirmed by the insular supreme court and the Court of Appeals, correctly found that the aforesaid "*sum of $320,306.53 was improperly included by the executor* [now petitioner] *as part of the cash assets, in his notice of decease of the testator Mario Mercado Montalvo, and, therefore, the inheritance tax paid upon aforesaid amount should not have been paid by the executor* [petitioner herein] and charged to the estate of aforesaid testator" (Partial Pr., R. 79 mid.).

It will be easily observed that the partnership Mario Mercado e Hijos is not bound, affected nor ordered to do anything by the Puerto Rico supreme court's judgment. Rights of parties are adjudged solely by decretal portion of decree. *McGhee* v. *Leitner*, 41 F. Supp. 674, 675; *Certain etc. Corp.* v. *Wallinger*, 89 F. 2d 427, 429, col. 2; *Herb* v. *Pitcairn*, 89 L. ed. 790, syll. 6, 324 U. S. 117.

Moreover, *the accounting proceeding was not directed against the partnership Mario Mercado e Hijos.* Under Puerto Rican law *when a proceeding is not directed against a person, he is not a necessary party. Flores* v. *Llompart*, 50 P. R. R. 641, syll. 2, 645 mid.; *Pellicia* v. *Court*, 36 P. R. R. 588. Said partnership was not even a party to the accounting proceeding, and *under local law persons not parties are not bound in any way by result in former case. Carrera* v. *Brunet*, 47 P. R. R. 420, syll. 2.[16]

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[16] See also *Federal Land Bank etc.* v. *District Court*, 45 P. R. R. at p. 201 mid. (person not joined as party, not precluded from exercising in future any right to which he may be entitled); *King* v. *Fernández et al.*, 30 P. R. R. at p. 558 bot. ("of course, this statement is made only for the purposes of this suit. Margarida & Company are not a party to this suit and, therefore, cannot be prejudiced by it"); *Rosado* v. *Valentín*, 65 P. R. R. 536, 538 top (the judgment rendered in an action to which a person was not a party, does not bind him). To the same effect see *Maldonado* v. *Programa de Emergencia de Guerra*, decided by the Puerto Rico Supreme Court, June 22, 1948, not yet reported in English.

Furthermore, the judgment herein was expressly entered by the local supreme court *"without prejudice to any right which the partnership Mario Mercado e Hijos may have"* (Partial Pr., R. 195 top). It is obvious that any alleged rights that the partnership may have were not only not prejudiced but expressly preserved by the insular judgment, and the courts below could proceed with the adjudication of the suit as between the parties who were properly before it. *Gandía* v. *P. R. Fertilizer Co.* (C. C. A. 1st), 291 Fed. Rep. 19, syll. 4, p. 22 top, cert. den. 68 L. ed. 519; *Waterman* v. *Canal-Louisiana Bank & T. Co.*, 54 L. ed. 80, syll. 2.

b. *The insular supreme court's judgment decrees nothing against Pedro M. Porrata, who is not a party to, and has really no interest in, this proceeding* (Petition, Point IV, pp. 6 mid., 46-51).

With unshaken insistence, worthy of a better cause, petitioner keeps on parroting that Pedro M. Porrata, one of his attorneys herein, is an indispensable party to this proceeding because, years ago, he was named by testator, Mercado Montalvo, a commissioner for partition.

However, petitioner overlooks that the distribution or partition of the hereditary assets was contractually *consummated by the heirs* through their compromise agreement of September 9, 1938, clause 3rd, subdivs. (f) and (l) (Partial Pr., R. 110 bot., 112 bot.-113). *See ante* Point I-A, subdivision 2, letter "c".

In that contract by and between the heirs or parties herein, the then (1938) executor, now petitioner, and also Porrata, ex-commissioner for partition, *expressly assented in so far as such distribution of the inheritance might in any way affect them* (Partial Pr., R. 113 top). That the heirs accepted the inheritance and agreed upon its distribution, was expressly decided on July 14, 1943, by the Island's supreme court in *Mercado* v. *District Court*, 62 P. R. R. 350, and at pp. 356 mid., 357 mid., 369 top, aff'd in *Mer-*

cado Riera v. *Mercado Riera*, 152 F. 2d 86, 90, cert. den. 90 L. ed. 1612. *And in the case at bar*, the highest local court again held, May 8, 1946, *that the distribution and adjudication of testator's properties and of such other assets that may be discovered later*, was agreed upon by the coheirs in clause 3rd, paragraph (f), of their compromise agreement (Partial Pr., R. 192).[17]

Besides, in Puerto Rico, a voluntary distribution of assets among heirs of legal age, renders unnecessary any further action or intervention by an ex-executor (petitioner herein) or an ex-partitioner (as his attorney Porrata), particularly when, as here, they consented to the partition agreement and, a fortiori, if they later suffered their respective incumbencies to expire. See *Puerto Rican Code of Civil Procedure*, ed. 1933, § 604; *Pellicia* v. *Court*, 36 P. R. R. 588 (termination of executorship); *Ex parte Sotomayor*, 24 P. R. R. 172 (partitionship unnecessary); *Irizarr* v. *Registrar*, 22 P. R. R. 88 (to same effect); *Galindo y Escosura, Legislación Hipotecaria*, Vol. II, pp. 257 258 (to same effect).

It may be added that, as a matter of local law and practice, a commissioner in partition, to whom no term was fixed by testator to discharge his trust, as happened here, has only such time therefor as is allowed the executor by will or by law. Upon the expiration thereof, the execution of a testator's will devolves upon his heirs and the latter are not bound to make partition with any commissioner's intervention. This was so held by the insular supreme

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[17] In this regard, the Puerto Rico supreme court specifically stated: *"The previous apportionment of the properties, made by the heirs themselves in virtue of the compromise contract, was acknowledged by this court in Mercado* v. *District Court*, 62 P. R. R. 350, 369. Hence, it was not necessary to make any pronouncement, such as the one contained in the order appealed from, *regarding the allotment of the properties, which the heirs had already apportioned among themselves, share and share alike."* (Partial Pr. R. 192 mid., *Mercado* v. *Mercado*, May 8, 1946, 66 D. P. R., Sp. ed., at p. 102 mid.).

court in *Mercado* v. *District Court*, July 14, 1943, 62 P. R. R. 350, syll. 4, and at pp. 368, 369.

Futhermore, a similar contention as to Porrata's alleged character as an indispensable party was rejected by the court of appeals below in *Mercado Riera* v. *Mercado Riera*, Nov. 23, 1945, 152 F. 2d at pp. 96, col. 2 bot.-97. It was there found that Porrata, one of petitioner's attorneys, had no financial interest in any phase of the litigation.[18]

In the instant cause, the judgment involved does not in any way affect, order or direct anything against Porrata, *but simply and exclusively against petitioner Mario Mercado Riera, who is the single and only party directed to restore or refund to the coheirs the amounts specified in the judgments below* (Partial Pr., R. 193-195). And, as already established, rights of parties are adjudged solely by the decretal portion of judgments or decrees. It must be recalled, too, that the accounting proceeding, as heretofore shown, was not aimed against Porrata. It was a matter which legally and according to the compromise contract (Partial Pr., R. 111, par. "g") *should have been, and was, wholly ventilated only between petitioner, as ex-executor, and his coheirs,* to whom the accounts were rendered by the former.

It is crystal-clarity, therefore, not only that Porrata was not an indispensable party to the accounting proceeding,

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[18] In *Mercado Riera* v. *Mercado Riera* case (152 F. 2d at pp. 96, col. 2, bot.-97), the court of appeals stated: "His presence [Porrata's] is not easy to understand. *In the first place it does not appear that he has any financial interest in any phase of the litigation * * * his fee was agreed upon in the contract of compromise, and the appellees say in their brief and Porrata admitted in argument before us, that this fee has been paid in full * * ** In the second place *Porrata is not officially affected by the judgments rendered by the court below * * * But the short answer to Porrata is that only final decisions of the Supreme Court of Puerto Rico are reviewable by us on appeal* (§ 128 of the Judicial Code; 28 U. S. C. A., § 225) *and the final decisions of the court below are embodied in its judgments, not in its opinion, and its judgments, as we have shown, do not affect Porrata * * **" (Italics supplied).

but also that Porrata could not even have been a proper party therein. In consequence, petitioner's claim of lack of due process in this regard is not only fanciful, but plainly frivolous. It simply amounts to a storm in a teacup.

c. *Obvious frivolity of point on alleged lack of due process regarding coheir Margarita Mercado Riera* (Petition, Point V, pp. 5, 51-54).

The Puerto Rico supreme court, construing insular provisions and applicable decisions, as a matter of local law, determined that Margarita Mercado Riera, one of respondents and of petitioner's coheirs herein, is entitled to a one-fourth share under the judgment in this case (Partial Pr., R. 150, *Mercado* v. *Mercado*, May 8, 1946, 66 D. P. R., Sp. ed., pp. 38, syll. 4, and pp. 62 mid., 102 bot.).

Petitioner's astounding claim, however, is that his sister Margarita is entitled to nothing because, as he asserts, she was not an adverse party to him in the accounting proceeding. Petitioner appended as part of his *statement on appeal* filed in the court of appeals (Partial Pr., R. 277-278) what is by him called an "appearance" or "motion" by coheir Margarita Mercado Riera before the district court of Ponce, which he claims to refer to the items of impeachment involved in this controversy.

This announcement by petitioner (Pet. 51, 53, 54) points to the following conclusions regarding that exhibit:

(1) The very fact that an attempt was made to bring the so-called appearance or motion as an appendix to the statement on appeal before the circuit court of appeals, shows that it is no proper part of the record, thus meriting to be expunged or discarded.[19]

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[19] See *Paddleford* v. *Fidelity & Casualty Co. of N. Y.*, 100 F. 2d 607, syll. 11, p. 614, col. 2, mid., cert. den. 83, L. ed. 1060; *Ortiz* v. *Quiñones*, 40 P. R. R. 657 (record on appeal should contain only proceedings on which judgment below is based); *Martínez* v. *Central Coloso*, 39 P. R. R. 113 (appellate court cannot consider evidence not acted on by trial court).

(2) That document appears to have been filed in a different proceeding, as its filing date is 1937 (Partial Pr., R. 277), whereas the accounting proceeding began in 1940, when the final accounts were rendered by the ex-executor, petitioner herein (*ib.*, 18, 25 bot.).

(3) In any event, said appendix exclusively refers to the *"quarterly accounts"* for the *"period from 1st September to the 30th of November, 1937"*, without even showing the items therein involved, *while the present proceedings refer* to petitioner's final account to March, 1940 (Partial Pr., R. 18, 26, 53); and it also purports to refer to an alleged undertaking "in favor of the remaining coheirs" respecting items in such quarterly accounts.

(4) Though petitioner Mario appears to be one of the signers of said Appendix B, he does not thereby consider himself—though he would so regard his sister Margarita (Partial Pr., R. 246, l. 7; Petition, p. 53 near bot.)—*estopped* from claiming to be entitled to a one-fourth of most of the items ordered by the supreme court to be restored by said petitioner.

(5) But the litigant really *estopped* from claiming that his coheir Margarita Mercado Riera is not an adverse party to him in the accounting, is petitioner himself, as exhibited by the very record he has sent up here. It shows that petitioner Mario Mercado Riera, on appealing to the local supreme court from the Ponce trial court's decision on the accounts, explicitly recognized his sister Margarita as one of the judgment creditors or adverse parties to him in this proceeding. *For that reason petitioner Mario, then addressed and served on respondent Margarita copy of his notice of appeal to the Island's supreme court, along with service thereof on co-appellee's, now respondents, Adrián and María-Luisa* (Partial Pr., R. p. 93 top, 2d line, p. 94 mid.).

Moreover, the Puerto Rican Code of Civil Procedure, ed. 1933, § 589, in part provides that *"if no objection be filed*

to an account, if in the opinion of the court the account is just and correct, an order approving same shall be entered", etc. *So, even when a coheir or any other interested party does not impeach the accounts, it is the court's duty, of its own motion, to carefully scrutinize all accounts and reject all claims which are improper, illegal or unjust. Estate of Anderson,* 74 Cal. 199; *Estate of Franklin,* 133 Cal. 584, 587; *Estate of More,* 121 Cal. 635.

Petitioner's point is so absolutely groundless and devoid of reason that the insular supreme court dismissed it *on purely local considerations,* as follows:

> "The third assignment presents a question which offers no difficulty whatever. The appellant executor [petitioner here] complains of his being compelled to restore the amount mentioned in the judgment appealed from as if the four heirs had objected when only two of them had actually challenged the accounts. The only reasonable interpretation of the judgment is that the executor should restore to the hereditary estate the sums which, according to the judgment, he has improperly disbursed. When making the final payments to the heirs, *each of these,* the contestants, as well as those who failed to challenge the account, will be entitled to receive one-fourth of the total amount restored to the estate" (Partial Pr., R. 150).

It is again manifest that the supposed lack of due process respecting this point is another of petitioner's whimsical conceptions.

C. The judgment of the local supreme court, which was affirmed by the court of appeals, rests on adequate non-federal grounds.

The record exhibits that the supreme court of Puerto Rico *did not pass* upon any federal question and that its judgment was solely predicated upon sufficient non-federal

grounds, that is, simply on sound local law of long standing (see insular supreme court's opinion, Partial Pr. R. 130-192). It was in the court of appeals that petitioner attempted to urge, as federal matters, the foregoing groundless points hereinbefore considered (167 F. 2d 207-208).

The rule is well known that when, as just stated, the judgment of the Island's supreme court, now sought to be reviewed, is supported by sufficient non-federal reasons, any contention regarding the existence of a federal question becomes untenable and dismissible. *Bell Telephone Company of Pennsylvania* v. *Van Dyke,* 80 L. ed. 379, 296 U. S. 533; *Woolsey* v. *Best,* 83 L. ed. 3, syll. 4, 299 U. S. 1; *Southwestern Bell Teleph. Co.* v. *Oklahoma,* 82 L. ed. 752, syll. 2, 303 U. S. 206; *McGoldrick* v. *Gulf Oil Corp.,* 84 L. ed. 536, 309 U. S. 2; *Holley* v. *Lawrence,* 87 L. ed. 434, 317 U. S. 518; *Flourney* v. *Wiener,* 88 L. ed. 709, syll. 4, 321 U. S. 253; *Herb* v. *Pitcairn,* 89 L. ed. 790, syll. 5, 324 U. S. 117; *Copperweld Steel Co.* v. *Industrial Commission,* 89 L. ed. 1363, syll. 2, 324 U. S. 780.

D. Lack of adequate or valid reasons for allowance of certiorari or mandamus herein.

1. *The propriety of Rule 39 of the Court of Appeals was settled by this Court in Mario Mercado e Hijos* v. *Commins, 88 L. ed. 1396, 1399, col. 2 mid., 322 U. S. 465.*

Instead of dismissing the appeal, as erroneously stated in the Petition, pages 1, 8, 9, 26, the court of appeals, after extraordinary scrutiny of *the complete typewritten record, the statement on appeal and reply brief presented and submitted by appellant, now petitioner,* as well as of respondents' motion to affirm under Rule 39(b), upon consideration of the merits of the controversy, affirmed the judgment of the insular supreme court on April 9, 1948 (Partial Pr. R. 370). It is thus crystal clear that the court of appeals did not fail to give complete considera-

tion to petitioner's appeal nor did it, in any way, minimize the importance of its reviewing function but, in fact, it fully discharged its duties and appropriately exercised its appellate jurisdiction on the merits by rendering an opinion and entering its affirmatory judgment (Partial Pr. R. 370). Such correct attitude and action on the merits is significantly silenced by petitioner and substituted in his petition herein for the ungrounded, really misleading assertion that petitioner's appeal was simply *dismissed* below (Petition, pp. 1, 8, 9, 26).

Without support in fact or in law and among the supposed reasons urged for a certiorari, petitioner states that the court of appeals treats "appeals from Puerto Rico in a different manner from appeals coming from other jurisdictions in the federal system" (Petition, p. 11 mid.). What petitioner apparently purports to reflect, as he unwarrantedly says in his petition (p. 2 mid.), is that Rule 39(b) of the court of appeals shows a "discrimination toward Puerto Rican appeals." But this very matter was brought to this Court's attention in *Mario Mercado e Hijos* v. *Commins* (1944), 88 L. ed. 1396, 1399, col. 2 mid., 322 U. S. 465, 64 S. Ct. 118. In that case, the court of appeals for the first circuit, under its Rule 39(b), summarily *affirmed* a judgment of the supreme court of Puerto Rico as involving questions of local law where the statement on appeal did not show the judgment appealed from to be inescapably wrong or patently erroneous. This Court then held that the judgment was *"so manifestly correct as to warrant affirmance without a hearing, on mere inspection on the face of the record, under a rule of the Circuit Court of Appeals for the First Circuit* [Rule 39(b)] *authorizing the summary dismissal or affirmance of judgments appealed from the Supreme Court of Puerto Rico involving only questions of local law* unless it appears from the record and appellant's required 'statement on appeal' that the judgment appealed from is inescapably wrong or patently erroneous." *Hijos* v. *Commins,* 88 L. ed. 1396,

1397, col. 2 near mid., 1399, col. 2 mid., 322 U. S. 465, 471. *Thus, the question posed has already been settled by this Hon. Court in the Commins case. That, of itself, would suffice for a dismissal or denial of the petition herein. Rule 38(5)(b), paragraph 3,* of this Court.

Moreover, one of the functions of the statement on appeal required to be filed by Rule 39(b) of the Court of Appeals is to disclose the basis on which it is contended the appellate court has jurisdiction by exhibiting, in appeals from Puerto Rico, that the proper jurisdictional amount is involved; and, where the jurisdiction is predicated upon a substantial federal question, by stating the grounds on which it is contended that the questions are substantial, specifying when and the manner in which they were raised, as well as the way in which they were passed upon below, etc. *This statement on appeal is analogous to the "jurisdictional statement" required to be filed by amended paragraph 1 of Rule 12 of the Rules of this Supreme Court of the United States* (316 U. S. 715, 86 L. ed. 719).

Rule 39(b) of the Court of Appeals for the First Circuit requires of appellant, in appeals from the Supreme Court of Puerto Rico *involving questions of local law,* to show in his statement on appeal that the judgment appealed from is inescapably wrong or patently erroneous. *Sancho Bonet* v. *Texas Co.* (1940), 308 U. S. 463, 84 L. ed. 801.[20] It also provides that the court of appeals will entertain a motion by appellee to affirm on the ground that it is manifest from the record and the statement on appeal that the judgment below was neither inescapably wrong nor patently erroneous, and consequently should not be disturbed; and it allows, in the alternative, a motion to dismiss the

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[20] In *De Castro* v. *Board of Commissioners* (1944), 88 L. ed. 1384, 322 U. S. 451, this Court re-examined the "inescapably wrong" rule and re-affirmed the same after explaining its history and the reasons of policy which led to its formulation.

appeal, all of which, with a supporting brief, to be filed within 20 days after filing and service of the statement on appeal. *Rule 26, paragraph 3,* of the Court of Appeals for the First Circuit, as to appeals from other jurisdictions than Puerto Rico, also provides for *motions to affirm* on the ground that it is manifest that the appeal was taken for delay only or that the questions on which decision of the cause depends are so unsubstantial as not to need further argument, and that such motion may be united in the alternative with a motion to dismiss. *Said Rules 39(b) and 26(3) of the Court of Appeals are substantially similar to paragraph 3 of Rule 12* (306 U. S. 696), *and to paragraph 4, Rule 7, of the Rules of this Hon. Supreme Court of the United States* (306 U. S. 690).

The core and purpose of these rules is to prevent baseless appeals. They allow motions to dismiss on jurisdictional grounds *or to affirm when it is manifest that an appeal is taken for delay or that the questions on which the cause depends are so unsubstantial as to need no further argument.* In fact, there is reliable information for the assertion that, at least 50% of the appeals to this, our highest national Court, are dismissed or the judgments affirmed upon considerations of the jurisdictional statement before the records are printed and without oral argument. See *American Bar Association Journal,* May 1945, Vol. 31, p. 239, col. 1 mid.

Furthermore, as above stated, the court of appeals in the instant cause, far from dismissing petitioner's appeal from the local supreme court, properly and fully performed its appellate duties by going into the merits of the case upon the statement on appeal with supporting brief and the reply brief submitted by petitioner himself, as well as on respondents' motion to affirm under its Rule 39(b). Thereafter, upon a most careful consideration of the whole matter, the judgment of the insular supreme court was affirmed on April 9, 1948, because "*under these circumstances it seems to us* [the court of appeals] *that the law*

permits summary affirmance under our Rule 39(b) since a hearing on the appeals would clearly be futile (*Mario Mercado e Hijos* v. *Commins,* 322 U. S. 465, 466) *and that justice requires summary affirmance in order to prevent further useless expense and delay in this already overly long and undoubtedly very expensive litigation''* (Partial Pr., R. 370).

Finally, the court of appeals' affirmatory opinion and judgment were rendered in conformance with the procedure under *Rule 39(b)* as expounded by the lower court in *Buscaglia* v. *Ligget & Myers Tobacco Co., Inc.* (C. C. A. 1st, 1945), 149 F. 2d 493, 496, footnote 3, as follows:

> "The propriety of this rule was discussed in *Mercado e Hijos* v. *Commins,* 1944, 322 U. S. 465, 64 S. Ct. 1118, 88 L. Ed. 1936. It has not been our idea, by the use of this rule, to avoid giving due consideration to the questions presented in appeals from the Supreme Court of Puerto Rico concerning matters of local law. Rather, the purpose has been to save needless expense and delay, involved in the printing of the record and hearing the case on oral argument. As a matter of fact, a large proportion of the cases coming to us from Puerto Rico in regular course are submitted on brief. The 'statement on appeal' which appellants are required to file by our Rule 39 is supposed to contain a succinct statement of the case and of the issues of local law presented, together with appropriate citation of authorities, designed to show that the judgment of the Supreme Court of Puerto Rico is manifestly erroneous. It really amounts to a short brief. *If the appellee moves to affirm under Rule 39(b),* he may, and usually does, file a brief in support thereof. After we examine the typewritten record, including the opinion of the court below, the statement on appeal, and appellee's brief in support of his motion to affirm, we sometimes find that *the judgment of the Supreme Court of Puerto Rico is so 'manifestly correct' as to*

make an appeal therefrom frivolous. We also sometimes find a case presenting fairly debatable questions of law which we would find it puzzling to decide if we were free to take a wholly independent view, but where, from the very fact that the case is a debatable one on its merits, we are morally certain that we should be obliged to affirm the court below, since its judgment is not 'inescapably wrong.' In both these situations we have conceived it to be proper to affirm under Rule 39b, without having the record printed and the case set down in regular course for oral argument."

2. *Review on a writ of certiorari is not a matter of right, but of sound discretion and will be granted only where there are special and important reasons therefor* (Rule 38(5) of this Court).

a. *The points and reasons relied on by petitioner here are, indeed, really frivolous* as the judgment of the supreme court of Puerto Rico, affirmed by the court of appeals, (1) in no way conflicts with any applicable decisions of this Hon. Court or with applicable local decisions, (2) nor does it depart from the accepted or usual course of judicial proceedings, (3) or in any way concerns the public interest.

As already demonstrated, petitioner even lacks the requisite standing or reviewable interest herein (this Point I, *subdiv. A, ante*); there is really no federal question involved here, much less of a substantial nature (I-B, *subdiv. 1, supra*); the insinuated lack of indispensable parties is not only far-fetched but, indeed, fantastic (I-B, *subdiv. 2*); and the judgment of the Island's supreme court, affirmed by the court of appeals, is based on adequate non-federal grounds (Point I-C, *ante*). It further appears that all points of local law urged by petitioner merely concern esoteric questions of Puerto Rican law, evidence and prac-

tice (Point II, *subdivisions A to C, post.*). As to these matters of local law and practice, the court of appeals also stated that it could—

> "• • • discern no 'clear or manifest' error, or anything 'inescapably wrong' • • • in the decision of either of these questions of purely local concern, or of any of the multitude of other similar questions presented, *but we cannot even discern any error at all in their decision.* Indeed, an inspection of the record and a study of the painstaking opinion of the Supreme Court of Puerto Rico, in which all questions presented were carefully, even elaborately, discussed, *leaves us with the firm conviction that a hearing on these appeals could not possibly disclose the existence of any error of sufficient magnitude to warrant reversal* • • •"
> (167 F. 2d 207, 208, emphasis supplied).

Uninterrupted and numerous rulings of this Court point to the doctrine of deference to the understanding of matters of local law as expressed in the pronouncements of insular tribunals. Their decisions, even when reviewable, should not be disturbed except upon a clear showing of patent or inescapable error. *Díaz* v. *González y Lugo,* 67 L. ed. 550, 552, 261 U. S. 102, 105-106; *Bonet* v. *Yabucoa Sugar Co.,* 83 L. ed. 947, syll. 2, p. 949, 306 U. S. 505, 510; *Bonet* v. *Texas Co. (P. R.) Inc.,* 84 L. ed. 401, 405, 308 U. S. 463, 471; *Puerto Rico* v. *Rubert Hermanos,* 86 L. ed. 1081, syll. 1 and 2, p. 1088, col. 2 mid., 315 U. S. 637, 646; *De Castro* v. *Board of Commissioners,* 88 L. ed. 1384, 322 U. S. 451; *Hijos* v. *Commins,* 88 L. ed. 1396, 322 U. S. 465.

b. The foregoing manifestly exhibits that *the certiorari petition suggests no reviewable question,* and much less any point *which it is in the public interest to have necessarily decided by this Court* of last resort. *Southwestern Bell Tel. Co.* v. *Oklahoma,* 82 L. ed. 752, syll. 2, 755, 303 U. S. 207, 212-213. *The record discloses that the controversy in the Puerto Rico supreme court involved only questions of a private character between private litigants in a purely local accounting proceeding.*

In *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 67 L. ed. 922, 924, col. 1 bot., this Court held that jurisdiction to bring up cases by writs of certiorari from circuit court of appeals, was conferred upon the Supreme Court of the United States for two purposes: first, to secure uniformity of decisions between those courts in the ten circuits; and, second,

> "• • • to bring up questions of importance which it is in the *public interest* to have decided by the court of last resort. *The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.*"

3. *The alternative extraordinary remedy of mandamus is obviously unwarranted.*

Petitioner himself claims that this case "falls squarely within the plain terms of Section 240(A) of the Judicial Code, as amended by Sec. 1 of the Act of February 13, 1925 (43 Statutes 938) • • •" (Petition, p. 2 top). That is now included in 28 U. S. C. A., § 347, pp. 259-260, where it is provided that when certiorari is proper it shall have the same effect "as if the cause had been brought • • • by unrestricted writ of error or appeal"; but its *subdivision (c)* states that "no judgment or decree of a circuit court of appeals • • • shall be subject to review by the Supreme Court otherwise than as provided by this Section."

As often stated by this Court, the drastic and extraordinary remedy of mandamus should be reserved for really extraordinary causes, and cannot be resorted to when there are other adequate modes of review, as by certiorari or appeal.[21] See *Ex Parte Fahey* (1947), 91 L. ed. 2041, 2043,

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[21] Petitioner also admits that he voluntarily forewent his right to move for a rehearing in the Court of Appeals (Petition, p. 2).

332 U. S. 258; *Kay Ferer, Inc.* v. *Hulen*, 160 F. 2d 147, syll. 3, p. 148, col. 2 bot.

Hence, if petitioner relies on certiorari as his appellate remedy, it leaps to the eye that mandamus cannot be invoked, as it does not lie to review a decision, as the one here involved, made by the court of appeals below in the exercise of its lawful jurisdiction. *Ex Parte Roe*, 58 L. ed. 1217, 1218, col. 1 mid.; *Ex Parte Riddle*, 65 L. ed. 725, 726, col. 2 bot.

A fortiori when, as appears from this Point I-D, *subdivision 1 above*, the court of appeals did not dismiss or decline its jurisdiction over petitioner's appeal from the judgment of the local supreme court. On the contrary, the intermediate federal appellate court went fully into the merits of the case and, after most carefully considering the statement on *appeal filed by petitioner*, respondents' motion to dismiss or affirm, the *reply brief or memorandum additionally submitted by petitioner himself*, and the complete typewritten transcript of the record, decreed and decided to affirm the judgment of the supreme court of Puerto Rico, under its *Rule 39(b)* (Partial Pr. R. 367-370).

E. The complete transcript of the record, on which the affirmatory judgment of the court of appeals was based, has not been printed and thus served, as required by the Rules of this Court.

The opinion and judgment of the supreme court of Puerto Rico, dated 8 May 1946 (Partial Pr. R. 130, 193), was based upon a record sent up by the trial court comprising "a transcript of the testimony which covers 2,838 pages and a transcript of the documentary evidence which comprises 855 pages * * *" (Partial Pr. R. 143, 368 mid.).

Such complete transcript of record with judgment roll containing the pleadings, opinion, judgment and other proceedings in the local supreme court, was lodged in the court

of appeals on January 19, 1948, together with petitioner's statement on appeal (Partial Pr. R. 213 mid., 214 top).

It now appears that petitioner, for the purposes of his petition for a certiorari, has caused to be printed only a part, referred to as the "judgment-roll" (Partial Pr. R. 371, 1-210), of the complete typewritten record which the court of appeals considered in rendering its affirmatory judgment on April 9, 1948 (Partial Pr. R. 214, 368 mid., 370 mid.).

The necessity of printing the complete transcript of the record, especially when the judgment of the insular supreme court, affirmed by the court of appeals, primarily rests on evidence, oral and documentary (Point II, *post.*), is patently shown by the fact that even the petition itself refers to documentary proof and the testimony of witnesses included in the complete *typewritten* record (Petition, pp. 26 mid., 28, 29, 60, 64, 66, 67, 70, 73, 76, 77).

Subdivisions 1, 2 (par. 4), 3 and 7 of Rule 38 of this Court, require that the petition for review on certiorari of a decision by a circuit court of appeals shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is to be directed; and that the certified transcript of the record be printed, and such printed record together with the petition, etc., is to be served on counsel for respondent within 10 days after the filing. Since the quoted provisions of Rule 38 of this Court have not been complied with by petitioner, respondents submit such omission as an additional and sufficient reason for denying the petition (*Rule 38, subdiv. 2, paragraph 4,* of this Court; *Stever* v. *Rickman,* 27 L. ed. 861, col. 2, 109 U. S. 74-75).

II.

The record, statement on appeal and briefs submitted to the Court of Appeals, required a summary affirmance of the insular Supreme Court's judgment (Rule 39b, CCA).

A. The judgment of the local Supreme Court on the points insinuated by petitioner, even if reviewable here, should not be disturbed as it merely deals with local law, evidence and practice.

That the points mentioned by petitioner in his Statement on Appeal below (Partial Pr. R. 214-275) and in his Petition here (pp. 7-11) solely refer to *local questions*, sufficiently appears from the foregoing considerations. But that will be additionally exposed by briefly examining the so-called *points of local law* alluded to by petitioner.

1. Alleged errors of local law regarding "partition"; petitioner's duty to refund $2,102.98 as interest unnecessarily paid by him on satisfying certain legacies; also $13,452.29 by him negligently disbursed; and concerning certain evidence respecting the meaning of "time" as used in the compromise contract.

a. *The local question as to agreed distribution and adjudication of testator's properties* (see Petition, Point IV, pp. 7, 46-51).

The point relative to the coheirs' agreed distribution and adjudication of their testator's assets is fully dealt with in Point I-A, *subdivision 2, letter "c"*, wherefrom it unquestionably appears that the insular courts have repeatedly passed upon this matter, adjudging that testator's properties were distributed and adjudicated in the Compromise Agreement executed by petitioner and his three coheirs on September 9, 1938 (Partial Pr. R. 110, bot., 113 top). *Mercado* v. *District Court*, 62 P. R. R. 350 and at pp. 356

mid., 357, 369 top, 372 top, affd. in *Mercado Riera* v. *Mercado Riera*, 152 F. 2d 86, 90 cert. den. 90 L. ed. 1612; *Mercado* v. *Mercado*, 66 D. P. R. at p. 102 mid., Spanish edition (Partial Pr. R. 192).

b. *The $2,102.98 interest outlay which petitioner was ordered to refund, as interest unnecessarily paid by him on satisfying certain legacies* (see Petition, Point VI, pp. 7, 54-64).

Concerning this item, the Ponce trial court held:

"With respect to part (B) of the 7th impeachment to wit, 'Unnecessary payment of interest, prejudicial to the estate,' amounting to $2,102.98 on the first partial payment of legacies, the court finds as follows:

"With respect to part (B) of Impeachment 7th, the Executor rendering the accounts replied as follows:

"(1) That there was no money available for the payment of the fourth part of the legacies, not even on October 1938; and

"(2) That the controversy with respect to the Federal Estate tax made impossible the application of the assets of the estate to payment of liabilities.

"In the testament (Exhibit No. 1 for the executor) it was provided that all legacies (except that of Pastor Mandry) would begin to bear interest at 7 percent per annum at the expiration of ninety days from the decease of the testator, and that they would be payable, the fourth part of each, 'from the cash on hand in banks, and the rest within a term of four years, at the rate of one-fourth part per year.'

"(The legacy to Pastor Mandry for $100,000 was to bear interest at the rate of 4 percent annum.)

"In order to pay aforesaid legacies in the manner provided by the testator the executor obtained the agreement of the co-heirs (article 824, No. 2, Civil Code, 1930 Ed.) in the contract of compromise signed

on September 9, 1938. (Exhibit No. 2 of the executor, 3rd clause, letter j.)

"It appears from the inventory (Exhibits C and D of the objectors) that the net assets of the estate amounted to $929,430.48. From said inventory and from the final accounts rendered by the executor (Page 3) the sum of $264,894.83 appears as cash on hand and in banks on September 9, 1938; and there appear accounts receivable by the estate and payable by the partnership 'Mario Mercado e Hijos', in the sum of $413,064.63.

"*It has been proven that in October 1938 there was sufficient cash to make the payment of the fourth part of the said legacies.*

"With respect to the Federal tax controversy, the court is of the opinion that said matter did not prevent in any way the use of monies possessed in Puerto Rico, as the 'transfer certificate' (Exhibits Nos. 42 and 43) from the Federal Internal Revenue Bureau shows that the only sum which was not available to the estate, by reason of the Federal tax controversy, was the sum of $200,000 located in the city of New York, U. S. which were deposited in the National City Bank, and which were not available unless a release or transfer certificate were previously obtained from the Government.

"Therefore, the court is of the opinion and so orders, that the sum of $2,102.98 of unnecessary interest paid by executor on the first installment of aforesaid testamentary legacies should be transferred to the assets of aforesaid final accounts" (Partial Pr. R. 64-65).

This phase of the Ponce court's decision was thus affirmed by the local supreme court:

"8. In the eighth assignment it is urged that the lower court erred in ordering the executor to restore $2,102.98 claimed to have been unnecessarily disbursed in making the first payment on account of the legacies.

"The first partial payment of legacies and interest thereon was made by the executor on May 23, 1939, and, according to the final account, it amounted to $86,250. The opposing parties urged that the executor could have made those payments seven months before the time he did, that is, on October 22, 1938, *inasmuch as on that date there were sufficient assets on hand, the use of which would have prevented the unnecessary outlay of the sum paid as interest.*

"In the will of the decedent it was directed that all the legacies, with the exception of that belonging to Pastor Mandry, should bear interest at 7 per cent per annum after ninety days had elapsed from the death of the testator, and should be paid, one-fourth of each legacy 'out of the cash deposited by him in the bank, and the balance within four years, at the rate of a one-fourth portion each year.' The legacy of $100,000 in favor of Mr. Mandry would bear interest at 4 per cent per annum.

"The consent of the heirs to the payment of the legacies, as required by § 824(2) of the Civil Code, 1930 ed., was granted to the executor by the Third clause, subdivision (j), of the compromise contract.

"The executor attempted to excuse his delay in making said payment, by alleging (a) that in October 1938 there were no funds available for the payment of the one-fourth portion of the legacies, and (b) that the claim of the Federal Government regarding the payment of an inheritance tax prevented the application of the assets of the estate to the payment of the liabilities thereof.

"*The findings made by the lower court are supported by the evidence, which we have carefully examined.* According to the inventory, the net assets of the estate amounted to $929,430.48. That inventory and the final account of the executor show that on September 9, 1938, the cash deposited in the banks and on hand was $264,894.83, and the sums owed by

the partnership Mario Mercado e Hijos to the heirs amounted to $413,064.63. *It is manifest that in October 1938, the executor had in his possession ample funds enabling him to satisfy the legacies at that time and thus avoid the payment of interest.*

"The controversy with the Federal Government can not be considered as a sufficient justification for the executor to refrain from paying the legacies at the proper time. That controversy was limited to the sum of $200,000 which was deposited in the National City Bank, in the city of New York, in the name of the testator. The executor could not dispose of that sum without first obtaining the corresponding release or transfer certificate.

"The lower court did not err in holding that the executor, as a trustee, was answerable to the heirs for the sum unduly paid. See Sanchez Roman, Derecho Civil, vol. 11, p. 1454" (Partial Pr. R. 156-157).

c. *Evidentiary matter regarding petitioner's negligent interest disbursement of $13,452.29* (see Petition, Point VI, pp. 7, 56-64).

The $13,452.29 which, due to petitioner's negligence, the Puerto Rican Treasurer charged for unnecessarily delayed payment by the executor of the local estate tax, *both courts in Puerto Rico, on the evidence by them considered, ordered petitioner to refund* (Partial Pr. R. 75-79, 157-160, 193-195).

Petitioner had obligated himself in the compromise agreement to file decedent's death notice with the Treasurer *within 10 days from said agreement* on September 9, 1938, so as to avoid a delayed payment of the local estate tax (Partial Pr. R. 111 mid., letter "i", 158 mid.). At the Ponce trial court, petitioner unilaterally tried to relieve himself from said contractual duty by his attempted parol evidence that the agreement was changed "at the moment of signing the contract" (*Typ. R., Oral Testimony,*

285 top; Petition, 66-70). Upon objection to such testimony by one of respondents' counsel on the ground that the testimony would amend, modify or alter a written contract validly made by the interested parties, etc. (*Typ. R., Oral Testimony,* p. 285 mid.), counsel for petitioner stated to the court that the intention was not to change the terms of the compromise contract but that "before the contract was signed" petitioner notified all the parties who signed the contract "including Mr. Poventud * * * that on the next day he was sailing for the United States" (*ib.,* 286 mid.). Thereupon Mr. Poventud, of counsel for respondents, stated: "*There is no such thing as to me*" (*ib.,* 286 mid.).

Then, respondents moved the trial court to strike out petitioner's testimony whereby he sought to change or vary the compromise agreement on the point aforesaid, *on various grounds of local law,* such as the *Law of Evidence,* § 24 (best evidence rule), § 25 (the parol evidence rule), § 101, pars. 2 and 3, as well as § 1186 of the *Civil Code,* ed. 1911 (§ 1172, *Civil Code,* ed. 1930); that such testimony tended to suppress petitioner's contractual obligation which bound him to file decedent's death notice within 10 days from the agreement; that no issue had been raised by petitioner as to the validity of the compromise contract; that the admission of said testimony would constitute a collateral impeachment of such contract; that under the local Civil Code, ed. 1930, § 1715, a compromise agreement amounts to *res judicata* between the contracting parties; that such contract was signed, accepted, ratified and presented in evidence by petitioner himself who could not, therefore, impeach it; that after he had so presented the agreement in evidence, it did not lie in his power to accept it in part, as to what he thought might favor him, and to reject its residuary portions; that no basis had been shown as required by the *Law of Evidence,* § 36, par. 5, as to any previous agency to modify the contract for respondents, etc. (*Typ. R., Oral Testimony,* pp. 556-558).

Dr. Belaval, one of the parties to the compromise contract (Partial Pr. R. 95), also substantially testified in the trial court that anything not found in the contract was not agreed upon (*Typ. R., Oral Testimony,* p. 1542 bot.).

The court of first instance at Ponce struck out or eliminated "that part of the statement of the witness which refers to Mr. Poventud" (*Typ. R., Oral Testimony,* pp. 352, 358), and also made a more considered and comprehensive ruling granting the motion to strike (*ib.,* 595-597), *thus according due weight and respect to the compromise agreement as written, accepted and put into operation by the parties themselves.* Petitioner himself cannot but concede that "a contract cannot be made for the parties by the court; it can only enforce an existing one * * *" (Petition, p. 74 top).

Petitioner's statement on appeal in the lower federal appellate court (Partial Pr. R. 246 bot.) and his petition herein (p. 7), not only admit that the foregoing are *"questions of local law"*, but also state that *"This point of local law raises a question of evidence"* (Petition, p. 65 mid.). Hence, the rulings below should not be disturbed, as the local supreme court, *after a very careful consideration of the evidence,* found, reasoned and concluded, thus:

> "11, 12 and 17.—These three assignments should be discussed jointly, inasmuch as they involve the same question. The appellant executor [petitioner here] urges that the lower court erred:
>
> "(a) In not admitting evidence to show that the 10-day period fixed by the compromise contract for the payment of the inheritance tax is and should be interpreted as a merely directory condition.
>
> "(b) In not holding that if said condition was not directory, it was impossible of performance under the evidence introduced.

"(c) In compelling the executor to restore to the heirs Adrián and María Luisa Mercado Riera the sum of $13,452.29, that is, one-half of the $26,904.58 collected by the Treasurer of Puerto Rico as surcharges on the amount of the inheritance tax.

"The opposing heirs contend that the agreed term for the notification of death and payment of the inheritance tax was definite and mandatory in character; that compliance therewith was possible; and that the court *a quo* did not err in ordering the restitution of the sum unnecessarily paid by the executor.

"The *trial court made the following findings:*[22]

"That the statutory term of 180 days, counted from the date of the death of the decedent, expired on February 18, 1938, and the executor did not file a notification of the death of the testator nor pay the inheritance tax until February 29, 1940, that is, two years and ten days after the expiration of said term.

"That under the compromise contract (Third Clause, subdivision (i)) of September 9, 1938, the executor bound himself to file the notification of death 'within the ten days following this date', and further bound himself to pay, upon the liquidation of the tax, the portion thereof pertaining to each of the heirs and legatees.

"That on the day following the execution of the contract, the executor left for the United States in order to attend to the matter of the federal inheritance tax and did not return to the Island until March 15, 1939; and that 49 days after his return, that is, on May 3, 1939, the executor filed the notification of death

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[22] The Ponce district court also found: " * * * *The inventory of the properties composing the estate had been agreed upon and prepared by the coheirs themselves and had been incorporated in the contract of compromise which was signed on September 9, 1938, that is, the day before the executor departed for the United States.*" (Partial Pr. R. 78 top.)

of the decedent. It took the Treasurer 115 days to liquidate the tax, which was paid on September 29, 1939.

"The lower court held that the absence and stay of the executor in the United States 'did not constitute unsurmountable obstacles to a compliance by the executor with the obligation contracted by him to file the notification of death within the agreed term of ten days', for even while he was in the United States he could have directed his subordinates, agents, or attorneys to prepare and send said notification, together with the inventory, which had already been accepted by the interested parties and attached to the compromise contract. (Section 5, 'An Act to Modify and Extend the Inheritance Tax', amended by Act No. 136 of 1939) (Laws of 1939, p. 672).

"The above cited § 5 of the *Inheritance Tax Act* imposes on every executor or person authorized to administer an estate, the duty 'to transmit to the Treasurer of Puerto Rico within the sixty days following the date of the death of the decedent whom he represents, a sworn notification of the death of said decedent, stating plainly: the name and residence of said decedent; the date of his death; * * * and as nearly as possible, the amount, valuation, description, and location of the estate of the decedent; etc.'. The Treasurer for just cause may grant an extension not exceeding sixty days for the filing of said notification. Section 9 of the same Act provides that the inheritance tax shall be paid 'within the term of one hundred and eighty days after the death of the decedent'; and if it is not paid within said term, 'interest at the rate of 1 per cent for each month or fraction thereof shall be charged and collected thereon.'

"Since the decedent died on August 22, 1937, the term of 60 days granted by said Act to the executor for filing the notification of death expired on October 21, 1937; and the term of 180 days allowed for paying

the tax expired on February 19, 1938, after which date the Treasurer was entitled to charge and collect interest at the rate of 1 per cent per month on the amount of the tax.

"On September 9, 1938, when the compromise contract was executed, the executor had already failed to comply with the provisions of the statute and imposed on the heirs the additional burden of having to pay interest at 1 per cent per month on the amount of their respective shares. The lower court did not err in holding that the stipulation to the effect that the executor 'within the ten days following this date, SHALL MAKE *the corresponding notification of death to the Treasurer of Puerto Rico' and that, once the liquidation was made, 'the executor shall pay for account of each heir, as well as of the various legatees, the portion of the inheritance tax pertaining to each', was not a merely directory condition but a definite and mandatory agreement, whereby the executor bound himself to carry out what the law compelled him to do in order to avoid the payment of interest.*

"Since the evidence shows that the executor had in his possession at all times sufficient funds for the payment of the inheritance tax, and since the executor failed to present any legal excuse sufficient to justify his delay in making such payment, it is just that he should be charged with the obligation of returning to the two opposing heirs the sum of $13,452.29 claimed by them. [At footnote 3, the Puerto Rico supreme court cites: '*The Harriman* v. *Emerick,* 19 L. ed. (U. S.) 629; *Klauber* v. *San Diego Street Car Co.,* 95 Cal. 353; *Jacksonville* v. *Hooper,* 40 L. ed. 515; 93 *Jur. Civil Española,* pp. 345, 346-350']." (Italics ours.) (Partial Pr. R. 157 mid.-160, 192 bot.; see Ponce trial court's decision, *ib.* pp. 75-79 top, 90 top.)

Therefore, it is undeniable that the decision and rulings of the Ponce district tribunal, as affirmed by the insular supreme court and by the court of appeals, concerning matters of purely local law and evidence, far from being erroneous, *are right and patently correct.*

2. *Imaginary errors as to credit for $45,359.50, loaned by decedent to firm of Mario Mercado e Hijos* (Petition, Point VIII, pp. 8-9, 70-72); *and respecting $15,535.70, being the difference between a testator's credit of $428,600.33 entered by petitioner in his account as $413,064.63* (Point IX, Petition, pp. 9, 72-74).

a. *Item or chose in action for $45,359.50* (Petition, pp. 8, 70-72).

The supreme court of Puerto Rico held includable by petitioner in his accounts to the heirs, a chose in action for $45,359.50, which decedent had loaned to the partnership Mario Mercado e Hijos. In the absence of any proper help in petitioner's statement on appeal before the court below (Partial Pr. R. 261-265) and in the petition herein (pp. 70-72), by way of pointing out concrete problems or questions for this Hon. Court's consideration, respondents feel bound to supply such deficiency by setting out the insular supreme court's relevant findings and views on the points which petitioner generally insinuates or merely mentions.

On the item now considered, the supreme court of Puerto Rico found:

> "IX. The facts which gave rise to this assignment are, in brief, as follows:
>
> "Mario Mercado Montalvo had a personal savings account in the *Ponce branch* of the National City Bank of New York. The balance which existed in his favor in that account, at the time of his death on August 22, 1937, amounted to $201,871.02.
>
> "On April 5, 1937, Mr. Mercado personally withdrew from that account the sum of $47,000. Pur-

suant to his instructions, the bank transferred the $47,000 to its central office in San Juan to be delivered to José R. Peralta, Manager of Mario Mercado e Hijos. On the same day said sum was delivered to Peralta and Pastor Mandry, Jr., against the receipt signed by the former on behalf of the partnership Mario Mercado e Hijos. On the following day, Peralta and Mandry tendered to Elvira Olivieri Cummins and the Lluveras, of Yauco, the sum of $45,359.50, by reason of a priority which the partnership Mario Mercado e Hijos claimed in connection with the purchase of certain land. Upon the refusal of Mrs. Olivieri and the Lluveras to accept the money, Mr. Mandry brought an action against them in the District Court of Ponce, and on behalf of the abovementioned partnership he deposited that sum in court.

"In the inventory attached to the compromise contract, the executor failed to include the alleged credit for $45,359.50 in favor of the decedent and against Mario Mercado e Hijos; but it was expressly stipulated that all credits, rights, and claims belonging to the decedent which might turn up or be discovered in the future, would be considered as inventoried. In the notification of death sent to the Treasurer, the executor included as belonging to the decedent the balance which appeared in the savings passbook, amounting to $201,871.02; and on the basis of that sum he paid the inheritance tax.

"Mario Mercado Riera, besides being the executor and managing director of Mario Mercado e Hijos, was the person who signed and verified the complaint regarding the deposit of the $45,359.50; but neither in the books of the partnership nor in those of the executorship was any entry made respecting said deposit.

* * * * * * * *

"The facts stated above are supported by the evidence introduced by the opposing heirs, which was strengthened rather than controverted by the one adduced by the executor. The purpose sought by the contestants in introducing their evidence was not to demand a decision adjudging Mario Mercado e Hijos to pay to the Heirs of Mercado the sum loaned by Don Mario to the partnership to be deposited by the latter. The lower court had no jurisdiction to make such an adjudication, inasmuch as Mario Mercado e Hijos was not a party to the proceeding nor had submitted itself in any way to the jurisdiction of the court.

"Nevertheless, the opposing heirs were entitled to introduce evidence tending to show that certain funds which personally belonged to the decedent had been loaned by the latter to the partnership Mario Mercado e Mijos in order to enable the latter to make the deposit in court. Since the evidence adduced was sufficient to establish prima facie the obligation on the part of Mario Mercado e Hijos to repay, to Don Mario Mercado or his heirs, the sum loaned, the lower court had jurisdiction to order the executor to include the alleged claim among the assets of the estate. The mere inclusion of the claim in the inventory of the estate does not injure any right belonging to the supposed debtor, the partnersip Mario Mercado e Hijos, inasmuch as the latter will have an opportunity to be heard and to defend itself if and when the allottee or allottees of said claim seek to enforce it by judicial action. The only effect of the inclusion sought is to lay a foundation for the allottee of the claim to demand its payment.

"We have carefully examined the whole evidence. We regard it as ample and sufficient to establish prima facie the right of the opposing heirs to have included in the inventory, as a chose in action belonging to the estate, their right to claim the repayment of the alleged loan.

"The ruling complained of will be reversed and substituted by another directing the inclusion of the alleged claim in the inventory and in the final account of the executor" (Partial Pr. R. 185-186 top, 186 bot.-187).

b. *Deficit of $15,535.70 as to an item in the accounts* (Petition, Point IX, pp. 9, 72-74).

Likewise, it was decreed below that petitioner restore $15,535.70, as the difference between a decedent's credit, which the ex-executor (petitioner herein) reported to the insular Treasurer at $428,600.33, *whereon he paid local estate tax out of hereditary funds*, but which credit, in his final account, petitioner had entered at only $413,064.63. The trial court ordered restoration by petitioner in his account of said testator's credit at $428,600.33 (Partial Pr. R. 82 bot.). The insular supreme court modified the district court's judgment only to permit accounting petitioner "*to include as liability in his final account* the sum which, according to *the liquidation by the Treasurer* and the vouchers in his possession, was paid to the insular Treasury as income taxes owed by the testator at the time of his death (Partial Pr. R. 171 mid., 193 bot., *Mercado* v. *Mercado*, May 8, 1946, 66 D. P. R. 82-83, Spanish edition; italics supplied).

In the interest of clarity, respondents more fully quote from the Ponce district court's decision:

"Additional Objections Letters (B) and (C). *Decision.* The court, after having considered the documentary and testimonial evidence introduced by both parties and especially Exhibit No. 25, arrives at the conclusion, and it so Holds, that it should sustain and hereby sustains Additional Objection Letter (B) • • • and therefore, it orders that the executor include in his final accounts the sum of $428,600.33, instead of the sum of $413,064.63 appearing in the final accounts as 'Testator's Credit against the Partnership Mario Mercado e Hijos' " (Partial Pr. R. 82 bot.).

The Supreme Court of Puerto Rico, on this item finally adjudged that:

> "3. The order appealed from is modified in the sense of ordering the accountant [petitioner here] to enter in his final account the sum of $428,600.33 in lieu of the sum of $413,064.63, which originally appeared in that account as the amount of the credit owned by the decedent against the partnership Mario Mercado e Hijos; but the accountant is authorized to include as a liability in his final account the sum which, according to the liquidation made by the Treasurer and the vouchers in his possession, was paid to the Insular Treasury as income taxes owed by the testator at the time of his death" (Partial Pr. R. 193 bot., judgment; *ib.*, 169-171, opinion).

The foregoing conclusions clearly indicate that the local matters passed upon by the lower courts were rightly decided. Obviously, petitioner is not entitled to a fourth hearing *de novo*. In the interest of public policy and the quiet of families, there must be an end to needless litigation.

3. *Alleged error regarding petitioner's duty to refund $20,019.05 illegally paid by him as local estate tax on $320,306.53, which was not part of the hereditary assets* (Petition, Point X, pp. 10, 74-77).

The evidentiary matters referred to by petitioner in his *statement on appeal below* (Partial Pr. R. 265 mid., 268) and in his Petition here (pp. 74-77), relative to this point concerning the $20,019.05 insular inheritance tax illegally paid by him on non-hereditary assets, were all rejected by both insular courts. Petitioner even recognizes that "the contract provides that the heirs acknowledged the fund transferred [$320,306.53] to be of the exclusive and sole property of partnership Mario Mercado e Hijos and to have been so * * *" (Petition, p. 74 bot.; Partial Pr. R. 266 top).

Thus, *this purely local question was passed upon by the Ponce district court upon the evidence introduced by the parties,* as follows:

"With respect to part (B) of said impeachment No. 12, in connection with a restitution to the objectors of the sum of $20,019.15, as half of the inheritance tax paid on monies belonging to the partnership Mario Mercado e Hijos but which were improperly declared in the notice of decease of decedent Mario Mercado Montalvo, *the court, as a result of the evidence introduced by both parties, concludes, and it so holds, that said $320,306.53, as covenanted in clause third, letter (d) of the contract of compromise of September 9, 1938, exclusively belonged to the partnership Mario Mercado e Hijos, an entity distinct and apart from the decedent. And, therefore, said sum of $320,306.53 was improperly included by the executor as part of the cash assets, in his notice of decease of the testator Mario Mercado Montalvo, and, therefore, the inheritance tax paid upon aforesaid amount should not have been paid by the executor and charged to the estate of aforesaid testator.*

"Therefore, the court is of the opinion, and it so holds, that it should also sustain part (B) of impeachment No. 12, and that, therefore, it should order, and hereby orders, that the executor make restitution to the final accounts with legal interest, to the objectors, of the sum of $20,019.15, which is one-half of the inheritance tax improperly paid by said executor on a sum of money belonging exclusively to the partnership Mario Mercado e Hijos" (Partial Pr. R. 79, italics ours).

The supreme court of Puerto Rico did not, in any way, modify this aspect of the trial court's decision, but, on the contrary, affirmed it in all respects (Partial Pr. R. 134 bot., 142 mid., 192 bot.).

In short, as to the preceding questions, petitioner merely seeks disturbance of findings of fact under local law, concurred in by both insular courts, wholly supported by the evidence adduced and in perfect accord with local practice.

Petitioner evidently misconceives the function of appellate courts. Nothing is left to this review but, in effect, a request to conduct a trial *de novo*. It is enough if any substantial evidence supports the judgment. In addition to *Rule 39(b)* of the court of appeals, and to well known federal decisions precluding appellate intervention in cases appealed from the insular supreme court of Puerto Rico, except in presence of inescapable or patent errors, a United States statute generally prohibits reversal even for established errors of fact. 28 U. S. C. A., § 879.[22]

4. *Asserted errors concerning $2,625.00 (half of $5,250) of testator, entered as "Fondo Panteón Familia" in the books of firm Mario Mercado e Hijos* (Petition, Point XI, p .10); *as to $11,234.16, misused, out of hereditary funds, in property of petitioner* (Petition, Point XII, p. 11); *and regarding $5,721.52, illegally paid to third persons* (Petition, Point XIII, p. 11 mid.), *all of which petitioner was ordered to restore.*

Petitioner has conceded that the above issues are *"of local law"* (Petition, 7, 10-11). A perusal of the decisions below will suffice to convince that there is no ground requiring appellate intervention with the determinations of the local courts thereon; also that the court of appeals was

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[22] This statute provides: "There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error * * * for any error in fact." This provision applies to appeals which have been substituted for writs of error. Act of January 31, 1928, c. 14, 45 Stat. 54, 28 U. S. C., § 861 (b); R. S. § 1012, 28 U. S. C. A., § 880. See *United States* v. *Lambert*, 146 F. 2d 469, syll. 2, 3; *MacHale* v. *Hull Co.*, 16 F. 2d 783, syll. 3; *Arkansas etc. Co.* v. *Blackwell*, 87 F. 2d 50, syll. 8; *Perrin* v. *Wiggins*, 57 F. 2d 622, syll. 2; *Westchester County Park Comm'n* v. *United States*, 143 F. 2d 688, syll. 17, p. 695, cert. den. 323 U. S. 726.

wholly correct in finding that "Not only can we discern no 'clear or manifest' error, or anything 'inescapable wrong' • • • in the decision of either of these questions of purely local concern, or of any of the multitude of other similar questions presented, but we cannot even discern any error at all in their decision" (Partial Pr. R. 369 bot.; 167 F. 2d 208, col. 2 mid.).

a. *Chose in action of $2,625 (Fondo Panteón Familia)* (Petition, Point XI, p. 10 bot.).

Petitioner was also ordered to include in his accounts a chose in action amounting to $2,625 (half of $5250), which belonged to decedent and was deposited and entered as *"Fondo Panteón Familia"* in the books of the firm Mario Mercado e Hijos (Partial Pr. R. 187 bot., *Mercado* v. *Mercado*, 66 D. P. R. at pp. 98-101, Spanish edition).

The supreme court of Puerto Rico modified and affirmed this item as follows:

> "X. The appellant contestants requested the inclusion in the final account of the executor, of the sum of $5,250, which appears in the books of Mario Mercado e Hijos under the title *'Fondo Panteón de Familia'* (Family Burial Vault Fund). The lower court denied the inclusion sought. The appellants urge that such a denial is erroneous. *Let us look at the facts.*
>
> "Doña Eufemia Riera Dubocq had been granted an award for damages sustained by her in consequence of the sinking of the S.S. 'Carolina', which was torpedoed by a German submarine in 1917. After this lady had died, her surviving husband, Don Mario Mercado, received the sum of $4,608.96 in payment of the amount of the award together with interest thereon. The District Court of Ponce designated the widower as the administrator of that sum, which was deposited in Banco de Ponce in an account entitled

'Mario Mercado and Family.' On June 22, 1931, when the deposit amounted to $5,250, the administrator withdrew it from the bank and transferred it to the partnership Mario Mercado e Hijos, in whose account books it appears under the title *'Fondo Panteón Familia'*, it being stated in the voucher that the money was derived from 'cash delivered by Don Mario Mercado Montalvo for repairs and completion of the family burial vault.'

"The order appealed from, in its dispositive part reads thus:

> 'When the amount of the award granted by reason of the sinking of S.S. "Carolina" was received, Mr. Mario Mercado Montalvo was alive and his wife had already died; at the time of the sinking of the Carolina, Doña Eufemia Riera Dubocq was married to Mario Mercado Montalvo and the award was made to "damages, physical suffering, and material damages" (sic) sustained by Doña Eufemia Riera Dubocq.
>
> 'There is no doubt that the award for damages recovered belonged *to the conjugal partnership.* (Sections 1301 and 1307 of the *Civil Code,* 1930 ed; *Vázqueez* v. *Valdés,* 28 P.R.R. 431; and numerous cases decided by the Supreme Court of Puerto Rico).
>
> 'The four children of the marriage, as heirs, are the sole and exclusive owners of the $5,250, amount of the damages, which was deposited in the civil partnership Mario Mercado e Hijos, now composed of those same four heirs.
>
> 'The court thinks, and it so declares, that that sum, belonging as it does to the heirs, should be included in the general inventory of the estate among the properties subject to partition, and should be delivered by the partnership Mario Mercado e Hijos which holds it as bailee, as soon as a

demand is made upon it therefor. (Sections 1666 and 1675 of the *Civil Code*, 1930 ed.).

'But, passing now upon the additional opposition marked with the letter (F), which relates to the final account of the executor, the court thinks, and it so holds, that "said sum of $5,250 has never been delivered to Mario Mercado Riera in his capacity as executor of Mario Mercado Montalvo and, consequently, its inclusion in the final account of the executorship is not proper." (Sections 54 and 55 of the Law of Special Legal Proceedings, embodied in Sections 587 and 588 of the Code of Civil Procedure, 1933 ed.).

'Therefore, the court considers that it should dismiss and does hereby dismiss, the additional opposition marked with letter (F)." Rec. pp. 90-93.

"The order appealed from is partly erroneous and should be modified.

"If, as the lower court correctly stated, the sum of $5,250 belonged to the conjugal partnership which existed between Don Mario Mercado and his wife, upon the dissolution of that partnership by the death of the wife, *the ownership of one-half of said sum passed to her four heirs as a part of their maternal inheritance, and the other half became the property of the widower, Mario Mercado Montalvo, as his share in the dissolved conjugal partnership. Upon the death of Don Mario, the one-half portion which belonged to him, passed in equal shares to his four heirs. The latter are, therefore, the owners of the whole of the compensation award, one-half of which they acquired by inheritance from their mother and the other half as a part of the paternal inheritance.*

"The accounting executor can not be compelled to include in his account the one-half portion inherited by the four heirs from their mother, inasmuch as it does not form a part of the estate of Mario Mercado

Montalvo. *But he can and should be compelled to include in the inventory and in his final account the one-half of the compensation award which belonged to the decedent as his share in the community property.*

"The decision appealed from should be reversed. In lieu thereof the accounting executor should be ordered to include in the inventory and in his final account a credit for $2,625, that is, the one-half share belonging to the decedent out of the item '*Fondo, Panteón Familia*', which shows a total of $5,250, according to the account books of Mario Mercado e Hijos" (Partial Pr. R. 187 bot.-190 mid., 195 mid.).

b. *The $5,721.52 illegally paid by petitioner to third persons out of hereditary funds* (Petition, Point XIII, p. 11).

As stated by the insular supreme court, the ex-executor (petitioner herein) "*disregarded the law*" (Partial Pr., R. 175 top) by illegally paying to several persons the sum of $5,721.52, wherefore he was ordered to refund the said amount (Partial Pr. R. 194 mid.).

This, petitioner apparently claims to be an error of *local law,* and respondents further maintain there was clearcut evidence plainly exhibiting illegality for the petitioner's disbursements, as correctly adjudicated by the Puerto Rico supreme court in these words:

> "I. The item of the final account entitled 'Aid to impecunious persons' for $5,721.52, was approved. The appellant heirs [respondents herein] urge that the lower court erred in not directing the executor to restore that sum to the assets of the estate * * * [Partial Pr. R. 173 top]
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> * * * * * * * * *
>
> "After considering the case dispassionately and calmly, we must agree with the appellant contestants

[respondents here] that the payments made to impecunious persons and invalids did not constitute a testamentary charge. *The will failed to show that the testator had made any legacy or provision in favor of indeterminate poor or indigent persons. In all the legacies and life pensions instituted by the testator the names of the beneficiaries were set forth but they did not include the names of the persons to whom the executor made payments after the death of the decedent.*

"The payments made by Don Mario Mercado during his life-time and as an act of pure liberality to certain persons, did not bind him or his heirs to continue making them after his death.

"The contention of the appellee executor that in making those payments to impecunious persons *he had acted in obedience to confidential instructions* received from the testator on several occasions, *has no foundation in law for it would be equivalent to admitting the legality of secret trusts which are rejected by subdivision 4, Section 714 of the Civil Code* (1930 ed.), according to which the following shall be inoperative: 'Those (provisions) the object of which is to leave to a person the whole or part of the inheritance in order that he may apply or invest it, according to secret instructions given him by the testator.' Maura, *Dictámenes,* Vol. IV, pp. 163, 164.

"The theory of the executor that the proven facts show the existence of *a contract of 'life annuity'* which bound Don Mario in favor of those impecunious persons, *is not tenable either.*

"A contract of 'life annuity' is an aleatory contract whereby the debtor binds himself to pay a pension to one or more specified persons for life in return for a principal sum in personal or real property, the ownership of which is at once transferred to the debtor, charged with the payment of the pension. Section 1702, *Civil Code,* 1930 ed. 'The contract is rather a

donation or a legacy, according as it is made *inter vivos* or *mortis causa.'* Manresa (1907 ed.) Vol. 12, p. 61.

"Besides a life annuity constituted for a valuable consideration (Section 1702, *Civil Code,* supra), the law acknowledges the possibility of an annuity being gratuitously constituted by a person on his property, and in such case the annuity has the character of a donation or benefaction made by the donor. 12 *Manresa Civil Code,* 1907 ed., p. 89. *A life annuity constituted gratuitously is governed by the general rules pertaining to gifts. 27 Enciclopedia Jurídica Española,* p. 220.

"Since the will contains no provision which would authorize the executor to make any payment to impecunious persons, and since no real property has been encumbered to secure the payment of the life annuities sought to be established in this case, those annuities must be governed by the legal provisions applicable to gratuitous gifts of personal property made *inter vivos.* Section 269 of the *Civil Code,* 1930.

"*Section 574 of the same code provides that gifts of personal property, such as money, may be made verbally* or in writing, *and that:*

> *'The verbal one requires the simultaneous delivery of the thing bestowed as a gift. In the absence of this requisite the gift shall produce no effect* if not made in writing and if the acceptance does not appear in the same manner.'

"*The evidence introduced shows that the decedent used to give aid to a number of necessitous persons by giving them certain sums weekly. No written or documentary evidence has been introduced to show that the decedent bound himself to continue making those weekly payments during his own lifetime or that of each of the donees.* And we have already seen that in his will he failed to make any legacy or to encumber

any real property for the purpose of paying those benefactions after his death. *The gift which the decedent bestowed weekly on his proteges were consummated by the delivery of the donated funds to each of the donees. A gift made verbally on the above-stated circumstances does not carry with it any implied promise or obligation to make future payments. 5 Manresa, Civil Code, 116, 118.*

"The lower court erred in not ordering the restoration of the amount paid. The order appealed from should be modified in the sense of directing the restoration of the amount of said item" (Partial Pr. R. 175 top-177 mid.).

c. *As to the $11,234.16 improperly diverted by petitioner from hereditary assets for use on property belonging to himself* (Petition, Point XII, p. 11).

Both the trial court and the local supreme court decreed that the petitioner should return the amount of $11,234.16 as illegally invested by him out of the coheirs' funds, in an urban property known as Marina No. 23, after he had become its sole owner (Partial Pr. R. 58-59; *ib.*, 150 mid.-151, *Mercado* v. *Mercado,* 66 D. P. R. at pp. 62 bot., 63, Spanish edition).

In this connection, petitioner's complaint before the court of appeals seemed to be that there was some sort of *conflict* in the evidence (Partial Pr. R. 271-274, *St. on App.*). But the short answer, as heretofore pointed out, is that the function of appellate tribunals is not to pass on alleged conflicts of evidence, if there is any substantial proof (footnote 23, *ante*) supporting the court's findings, especially so under *Rule 39(b)* of the Court of Appeals if the case hails, as here, from the Supreme Court of Puerto Rico.

That there is not the slightest error of any sort in passing upon the item now considered, will be most cogently

established by the pertinent portions of the decisions below.

As the Ponce trial court held:

> "'Restoration of Marina St. No. 23 House, $24,434.16.'
>
> "*Decision and Order. The court, after considering the evidence introduced by both parties, finds that the following facts, among other, have been proved:*
>
> "In the contract of compromise (Exhibit No. 2) of September 9, 1938, and by its clause first, letter (I), there was awarded to Mario Mercado Riera aforesaid house located on Marina Street and the adjoining lots, and, at the same time, there was definitely acknowledged, as correct disbursements from the hereditary estate, the sum of $14,200 of the expenses incurred by the executor in connection with the contract authorized by said decedent Mario Mercado Montalvo in connection with the house on Marina Street and the adjoining lots.
>
> "*Mario Mercado Riera* (the executor), *after said house on Marina Street No. 23 had been conveyed to him, continued spending money on the restoration of said house up to February 29, 1940, amounting to an additional sum of $11,234.16, which is the amount impeached by the objectors.*
>
> "The court agrees with all of the arguments of the objectors as set forth in their brief in support of this impeachment and adopts them, although he [it] does not set them forth herein for the sake of brevity; *it being sufficient, for the purpose of deciding the question, that as has been proved, Mario Mercado Riera * * * is the full owner of all the house located on Marina Street No. 23, and has been the owner thereof from September 9, 1938, when the contract of compromise was signed; the court holding that since the day on which Mario Mercado Riera became the absolute*

owner of said house, it became his obligation, and not that of the Succession of the decedent Mario Mercado Montalvo, to pay all expenses thereon exceeding the covenanted sum of $14,200.

"Wherefore, the court is of the opinion and so holds, that it should sustain, and hereby does sustain impeachment No. 1 and therefore orders, that the executor make restitution to the assets of the final account, of the sum of $11,234.16, *plus the legal interest*[24] of 6 per cent per annum on said sum, from February 29, 1940, which was the date, according to Exhibit No. 21, upon which the last item composing said impeachment sum was incurred" (Partial Pr. R. 58-59).

Upon a careful review of the local law and evidence, the insular Supreme Court affirmed as follows:

"Did the lower court err in refusing to approve, as a proper charge against the estate, the additional

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[24] The local rule of law is that where a person occupying a *fiduciary relation* misuses or applies to his own use funds entrusted to him which belong to another, the latter is entitled to *interest* thereon if no profits have been made from such use; if there is any profit, he may choose between claiming interest or the profits. To hold the contrary, "would be tantamount to rewarding him for his unlawful act." This doctrine "covers all persons occupying a fiduciary relation with respect to others." *McCormack* v. *González*, 49 P. R. R. 460, syll. 3, pp. 467 mid., 469 near top, 480 mid.

Yet, no question was raised by petitioner in the local Supreme Court respecting interest; and points not involved or raised below cannot be urged on appeal. *Supreme Forest etc.* v. *City of Belton*, 100 F. 2d 655; *Mauro* v. *Rodríguez* (C. C. A., 1), 135 F. 2d 555, col. 1, mid.; *Baetjer* v. *U. S.* (C. C. A., 1), 143 F. 2d 392, syll. 14; *Helvering* v. *Tex-Penn Oil. Co.*, 81 L. ed. 755, syll. 4, p. 766, col. 2, mid.; *Helvering* v. *Minn. Tea Co.*, 80 L. ed. 284, syll. 1; *Ex parte Franceschi*, 53 P. R. R. 73, syll. 4, p. 76 mid. (No question of interest was raised on the previous appeal); *Graniela* v. *Yolande, Inc.* (1946), 65 P. R. R. 664, syll. 3, and at p. 667 top (Once a judgment is affirmed, trial court lacks power to reconsider it as to any question—interest—that could have been, but was not, raised in local supreme court).

expenditure amounting to $11,234.16 on the restoration of the house at No. 23 Marina St.? Such is the question involved in the fourth assignment.

"Under the terms of the compromise contract of September 9, 1938 (First Clause, subdivision (1)), the house designated as 'Marina No. 23' was awarded to the heir Mario Mercado Riera, appellant executor herein, and the contracting heirs acknowledged *as a proper charge against the hereditary estate, the sum of $14,200* which up to that date had been invested by the executor in the restoration of that immovable. *The evidence shows that after the house had been thus awarded to him, the executor continued the work of restoration until February 29, 1940, and invested the additional sum of $11,234.16, which is challenged by the opposing heirs.*

"*The holding of the lower court is, in our judgment, correct.* Upon signing the compromise contract, the heir Mario Mercado accepted, as part of his hereditary share, a partially restored house, in which the sum of $14,000 had been invested, with the assent of all the heirs. *From that moment the above-named heir* [petitioner herein] *acquired the full ownership of the house and of the money invested in it. We fail to find in the compromise contract or in the evidence introduced, anything to show that the heirs had agreed to pay any additional expenses which the new owner of the property might have to incur in or ler to finish the restoration of the house*" (Partial Pr. R. 150-151, 192 bot.).

B. The decision of the Puerto Rico Supreme Court, affirmed by the Court of Appeals, should not be disturbed.

Nothing has been shown pointing to any violence done to local laws or the established practices in the Island. On the contrary, a most cursory glance at the insular supreme court's considerations and findings, clearly demonstrates

that they are, not only fully sustained by the evidence, but also reasonable, logical and in complete harmony with insular statutes, principles and prior decisions regarding the esoteric points of traditional Spanish law involved and most carefully examined and adjudicated by the Island's courts.

As held by the Court of Appeals (Partial Pr. R. 370 top), it is obvious that additional arguments by petitioner will not develop any point or issue, or any question of deference due to local decisions, so substantial as to preclude the summary disposition of the appeal under Rule 39(b) of the court below. *Hijos* v. *Commins,* 88 L. ed. 1396, 1399, col. 2 mid.; see *Sosa* v. *Sosa* (C. C. A. 1), 164 F. 2d 94.

This is so, as the judgment *a quo* is patently right respecting petitioner, Mario Mercado Riera. A *fortiori,* if it be recalled that, to justify disturbing judgments of the Puerto Rico Supreme Court, any alleged errors must be proven to be clear or manifest; the local "interpretation must be inescapably wrong; the decision must be patently erroneous." *Bonet* v. *Texas Co.* (*P. R.*) *Inc.,* 84 L. ed. 401, 406, col. 1 top; *Bonet* v. *Yabucoa Sugar Co.,* 83 L. ed. 947, 949, col. 2 mid.; *Puerto Rico* v. *Rubert Hermanos,* 86 L. ed. 1081, syll. 1 and 2, p. 1088, col. 2 mid., 315 U. S. 637, 646; *De Castro* v. *Board of Commissioners,* 88 L. ed. 1384, 322 U. S. 451; *Hijos* v. *Commins,* 88 L. ed. 1396, 322 U. S. 465. And certainly, the judgment of the insular supreme court, far from being erroneous, is "patently correct" (Partial Pr. R. 369 bot.).

Conclusion

For the reasons above stated, respondents submit and respectfully request that the petition for certiorari or mandamus herein, should be dismissed or denied.

Respectfully submitted.

José A. Poventud,
Attorney for Respondents,
Adrián Mercado Riera and
Margarita Mercado Riera,
Box 266,
Ponce, Puerto Rico.

Celestino Iriarte,
F. Fernández Cuyar,
Attorneys for Respondent,
María-Luisa Mercado Riera de Belaval,
Box 59,
San Juan, Puerto Rico.